

THE LEGAL INSTITUTION OF PROPERTY:
ITS NATURE AND BASIS

by

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I declare that this Thesis is based on my
own research and has not been accepted for a higher degree at
any other University.

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ABSTRACT

The basic theme of this thesis is to find the basis of the institution of property and the varying forms that it has taken during the course of development. The institution of property has as its main function fulfilment of needs of individuals. In the course of development the needs of individuals came to be fulfilled in different ways ignoring the main idea of the institution of property as a means to the satisfaction of needs of individuals. With the social and economic changes the idea of exchange value was introduced into the institution of property. With this development the human labour power, acts and activities which could produce products for the market economy, came themselves to be regarded as an object of property. The idea of exchange value, especially in this sense, was a new importation into the institution of property, having little relation to the basic idea of property. Thus the idea of ownership as a category in social and economic order for the satisfaction of needs of individuals gave place to such social and legal categories as 'contract' regarded as an incorporeal object functioning for the satisfaction of human needs not through the institution of property but through categories having no connection with the basic idea of the institution of property. Similarly the concept of the corporation as a form of ownership, further obscured the idea of control as an essence of ownership. Thus the forms of ownership which developed in the course of evolution of the institution of property lost contact with the basic idea of the institution of property - the satisfaction of needs of each individual. The institution of property came to be justified by

reference to these juristic fictions rather than to the idea of satisfaction of needs of individuals. The author is arguing for the restoration of an understanding of the institution of property in terms of its proper function in satisfying needs of individuals.

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In modern times it is the case that a man is a prince if he has a castle and not that he has a castle because he is a prince. A hero is he, who is a tycoon. A rich man is considered intelligent but a poor man, irrespective of his ability, is dumped as stupid because he has not the show and cleverness of a wealthy man to fulfil his needs. But why is this so? Because there is something wrong with our institutions. Such an attitude arises from the misdirection of our institution of property. Against such wrong sentiments Saint-Simon says that a country becomes barren not if it loses its kings and princes, etc., but if it loses its workers. Godwin says that it is greed and lavish living that has become the modern idea of a wealthy living rather than of simple living and high thinking. The institution of property that grew up in society to serve needs of each individual has come to serve needs of few. This has led me to argue for the basis of the institution of property in the satisfaction of needs of each individual.

In the completion of this thesis my sincere thanks are to Professor D.N. MacCormick whose utmost care and constant effort has brought this work to an end. From his erudition I benefited greatly. I am also thankful to Mr. A. McCall Smith who, from time to time, has suggested good sources of material which helped me in writing this thesis.

INTRODUCTION

This thesis attempts to present a view of the basis and nature of the legal institution of property. It advocates that the basis of the institution of property is found in the idea that some sense of 'control over things' has grown up with the idea of fulfilment of individual needs. This view is argued herein as the justification of the institution of property.

Man's immediate concern for his survival and to get provision for his living brings him in contact with whatever material he can appropriate from nature for his living. And herein one finds the germ of the institution of property. The appropriation of things to secure one's needs is the basis of property as an institution. With social and cultural changes, with new discoveries and inventions, the needs of individuals change as do the resources available to meet such needs. Such changes also produce changes in men's conception of property. But it will be argued that such new conceptions of property always reflect conceptions of the needs of men in given forms of society. Thus whatever other connotations are attached to the institution of property, it is in all circumstances concerned with the satisfaction of individual needs. The principal task of this thesis is to show the continuity of this function of the institution of property. It will be argued that any justification of property depends on successful fulfilment of this function for each individual, and that wherever legal systems diverge from that, the forms of property which they provide are unjustified. Wherever due to political, social, or economic reasons the institution of property has

been diverged from its task of enabling each individual to acquire the means of fulfilling his needs, the institution of property has ceased to fulfil its proper function.

The thesis falls into three main parts: the analytical, the historical, and the philosophical.

The analytical part deals with the structural analysis of property. The legal order defines and institutes the idea of ownership; basic to that is the idea of giving to an individual exclusive control over some 'thing'. The most basic aspect of that idea is the protection of an individual's personal control of some 'thing' which he holds for his personal use. As circumstances change, to meet new needs, the legal order extends its scope without changing its form - that is the form of ascribing to individuals control of things. Such a legal analysis creates a basis for understanding the new social, political, and economic conditions. Thus, in seeking to understand the institution of property, setting aside all these variations in terms of social, political, or economic considerations, which allow an individual a bundle of interests over an object, our primary concern is why an institution of property gives control over objects to individuals? What is set forth in this thesis is advocating the idea that all the diverse forms of ownership are only the modifications of the basic idea of serving needs of each individual. Thus when under a given legal system the institution of property does not fulfil this function of fulfilling needs of each individual, something is misread in the institution of property. This social, political, and economic point of view of the institution of property and the legal control

it embodies over things, takes priority over whatever connotations are attached to the institution of property. If we understand by the institution of property an agency which provides the control over things for the satisfaction of needs of individuals, it has a necessary existence in all societies. The mode of operation of the institution of property may be different in different societies, but theoretically the idea of fulfilling needs of individuals, though sometimes ignored, can never be denied since it is the basis of the institution of property.

The historical aspect of the institution of property clearly demonstrates that the idea of control over things embodies the idea of fulfilment of needs of individuals. Whatever vague ideas we have of the early institution of property, whatever scanty evidences we find of the early institution of property, and whatever disputes exist regarding the nature of the early forms of property, the origin of the institution of property demonstrates the idea of its existence for the fulfilment of needs of individuals. When after long struggle, turmoil, the institution of property established itself, that is, came to be understood as we understand it now, a criterion was developed to distinguish between property and non-property. The criterion developed was that of the monetary insignia - any thing that can be converted in terms of money was regarded as property. This development, however, ignored the subjective satisfaction that an individual gets in his possession of 'things'. Since an individual finds satisfaction in appropriating things, he regards them as a part of his self. In primitive times the idea of property in songs and dances refers to this subjective element expressed in the institution of property. And if one looks into the idea of property as

based on the idea of liberty, as Kant and Hegel believe, and the modern idea that private property is a guarantee of liberty, what is evident is not the insignia of monetary value but the subjective element found in the institution of property. Thus it is not essential that thoughts and ideas must have objective expression in terms of money; it is not the case that there is no other way to know their objective reality. The action of 'passing off' is now recognised as proprietary on the basis of not any exchange value in terms of money, but on the basis of subjective element involved as an expression of the self. The monetary criterion excludes the significance of finer values of life from the domain of the institution of property and fails to recognise that subjective values are as much necessary for human living as external things.

As a result of the idea of exchange value, all means by which a man can earn his provisions came to be regarded property or a part of the institution of property. This created a confusion between the means and the ends. As a result of this, new norms were introduced into the institution of property having no relation to the basic idea of the institution of property, though led to the development of the conception of property but at the same time made the institution of property alien to its own basic function. With this development there came a big gap between the idea of property as a means of fulfilling needs of individuals and property as a control over things.

Both philosophers and economists in the 18th and the early 19th centuries tried to justify the institution of property in terms of exchange values. The labour capacity and liberty in the sense of contract were

regarded as proprietary rights, since a man can sell his labour for money. This confusion between property and the means to earn property deprived a majority of people of their right of property in the basic sense of the term - of providing subsistence. The labourer's capacity to labour and his freedom to enter into contract turned from property to poverty. And in the arguments of classical liberalism the idea of property to satisfy needs of individuals was eclipsed by their introduction of new types of property. These thoughts in political circles led to the justification of capitalism rather than the justification of the institution of property.

But whatever be their arguments, the late 19th and the beginning of the 20th centuries saw a movement towards the reversion of the institution of property to its real basis - the satisfaction of needs of individuals. The question of human subsistence is making its mark as a fundamental right on future developments, related either directly or indirectly, to the institution of property. The socialist literature again and again refers to this theory of human subsistence. The imposition of duties on the property-holders so as to prevent the abuse of the right of property points to the growing recognition of the functional aspect of the institution of property - fulfilment of needs of individuals. Again we find the traces of fulfilling needs of individuals in modern legislation like compulsory education schemes, housing schemes, labour laws, etc. Wherever human life is affected because of economic conditions, it is an aspect of the institution of property. No economic activity can be separated from the institution of property.

CHAPTER I

STRUCTURAL ANALYSIS OF PROPERTY AND RELATED PROBLEMS

Structural Analysis of Property

There never has existed and it is quite safe to say, that there will never exist, a society, however savage, that will not recognise certain order in the social, legal or in any other rudimentary form.

Cairns states:

Order is a necessary condition of human social life and it is impossible to imagine a society in which order of some sort does not exist.

We may not find the legal order we have today, yet the order suited to the mode of life of the society at a particular time, would always be there. Any type of order, however feeble it may be, if it functions, and suits and satisfies the needs of a society, will be viable and capable of evolution. Bentham stresses the existence of an order as the basis of the institution of property. He states:

The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rival; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which, in the natural state, was an almost invisible thread, in the social state becomes a cable.

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1. Cairns, H., The Theory of Legal Science, Chapel Hill 1941, p. 15.
 2. Bentham, J., Theory of Legislation, London 1871, p. 113.

The recognition of ownership implies the existence of a social order, however small or feebly organised.

Whatever theory of evolution we advance for the development of civilisation, we find men at all times and in all circumstances, living in society, regulating their conduct and transacting their affairs according to recognised standards, though at times some are rebellious against others. It is to this established order that the individual conforms in society. As Troller says:

One may submit to it knowingly or unconsciously;
one may accept it or take an active part in its evolution;
but one cannot escape it.

Social order is the pre-condition of any society. Legal order represents an aspect of this order. Legal order regulates the conduct of men in relation to one another according to recognised standards, both as individuals and as members of the group. The subject matter of legal order is, thus, the relationship between human beings. It is not the expression of all desires and volitional acts that forms a part of legal order, but only or mainly those acts which affect the conduct of other individuals. This order may be supposed to serve the values of the existing society and to change with the change of circumstances. The object of legal order is to ensure social order and, therefore, it has to regulate the relations between men, and not their conscience regulation of which is the function of moral order. Troller states:

As an order it must be capable of allowing the will of the individual to take effect according to his particular personality and the kind of community in which he lives. It must also prescribe to what extent he must follow the

3. Troller, A., The Law and Order, Leyden 1969, p. 12.

will of other individuals or other groups or ⁴his own group.
It is this order which I call the legal order.

In this order of social relations we find the basis of different types of institutions. Property is one such institution. But the mode is identically the same in case of family, crime, marriage, etc. All institutions imply relations between individuals; the problem is how to differentiate the institution of property from other institutions. The institution of property, in addition to regulating the relation between individuals, ascertains their relation with reference to objects as well. The immediate purpose of ownership is to determine the relation between individuals in respect of the use of things. Cairns structuralises the property relation as follows:

The property relation is triadic: A owns B against C,
where C represents all other individuals ...⁵

The institution of property implies the existence of ordered relations which means the existence of norms to regulate human activities. The existence of normative order is an essential element for the existence of any institution. Norms are rules of conduct which prescribe behaviour patterns of individuals towards one another.

Ownership is established principally by norms of prohibition which regulate human conduct towards things. For example, A's right of property depends fundamentally on a prohibition imposing a duty on others not to interfere with A's use of the object of property. From the

4. Ibid, p. 12.

5. Cairns, H. Law and the Social Sciences, London 1935, p. 59.

stand point of the non-owner this means that the infringement of another's right is to be avoided not simply because of his physical force but because of the existence and recognition of the relevant norms. Mead, however, stresses the psychological element in the formation of norms - each man appealing to his right would arouse in another consciousness of the attitude of others.⁶

In this setting of the social order a legal right of ownership carries with it a legally supported right to use a definite thing for more or less definite purposes and for definite or indefinite time. The meaning of this right, is that all other persons are forbidden to interfere with the owner in the exercise of his right in respect of the thing owned, up to the point at which the limits of that right are prescribed by law. Once the right of property is vested in a person in respect of a thing, duty is imposed on others not to interfere with the owner's use of the thing. The right of A with regard to land (for example) is, thus at the most primitive level analysed in terms of legal relations between A, and an indefinite number of persons, who are excluded from the use of the land by the norm which imposes a duty on them not to interfere with A in his use of the land.

In this sense, the right of property is a personal right. It is a notion that is entirely produced by the regulation of inter-personal relations between persons with respect to things. It is a subjective right. The legal system creates subjective rights to regulate inter-personal relations. Turner refers to these relations when he states:

6. Mead, G.H., Mind, Self and Society, London 1934, pp. 161-62.

The law of ownership is not a set of rules fixing what I may or may not do to a thing but a set of rules fixing what other people may or may not prevent me from doing to the thing, and what I may or may not prevent them from doing to the thing.

It is obvious, thus, when law creates relations between a person and other persons with respect to things, and vests the right in one or more to the exclusion of others from the use or the disposal of a thing, the right is the right of ownership.

Thus, the series of elements into which the right of property may be arranged includes the following:

- 1) The ~~ex~~istence of normative order which recognises the institution of ownership;
- 2) the object of property;
- 3) the person in whom the ownership is vested;
- 4) the persons on whom the duty of non-interference is imposed.

Holland⁸ analyses right into four elements:

- 1) The Person entitled;
- 2) The Object;
- 3) The Act or Forbearance;
- 4) The Person obliged.

Hence property is an appropriation of an object by the individual and the acceptance of this appropriation on the part of the rest of the society. By this acceptance society thereby creates a right in the individual and imposes on itself an obligation to let the individual enjoy his appropriation.

7. Turner, J.W.C., "Some Reflections on Ownership in English Law", 19 Can. B.R. 1941, p. 343.

8. Holland, T.E., Jurisprudence, London 1900, p. 86.
Miller, W.G., Lectures on the Philosophy of Law, London 1884, p. 126.

A similar view is expressed by Green when he stated:

This is the recognition by others of a man's appropriation as something which they will treat as his, not theirs, and the guarantee to him of his appropriation by means of that recognition.

Ownership is, thus, a certain kind of position which the owner enjoys in the control or use of a thing to the exclusion of others. It is guaranteed in the right to exclusive use of a thing. For example, my property in my house, is not the house, but the right I have in respect of my house. Again my right of easement to cross over another's land is property, but if every one had the same title to cross that land, the right would not be one of property. The thing to which everybody has an access to use at the same time or at different times does not constitute anyone's property. Property pre-supposes a realm of private freedom. Without freedom to bar one man from certain activities or to allow another to engage in that activity, there can be no ownership. Similarly if all activities are either permitted or prohibited by general laws, there is no property. For example, if there is a piece of land which by general law is provided for everybody's use it is not private property of anybody. Neither is there property with reference to things which cannot be used or possessed like distant stars, nor with reference to things which may be used freely by everyone, such as the high seas. Thus in ownership it is not only the use or possession of a thing that is involved; but it is exclusiveness of use or possession which is the crux of ownership. Ownership is sometimes defined as

9. Green, T.H., Lectures on the Principles of Political Obligation, London 1895, p. 214.

the right of use. But this is to misread the fact of ownership. The right of use may be necessary to, but is not a sufficient criterion of, ownership. Ownership is a right fostered and protected by law for the exclusive use, enjoyment and disposal of a thing. Exclusion is the life essence of property.¹⁰ Holland makes a similar remark when he states:

The essence of all such rights lies not so much in the enjoyment of the thing, as in the legal power of excluding others from interfering with the enjoyment of it.¹¹

Similarly Ely states:

The right of property is an exclusive right, ...
that is, it excludes others.¹²

It has been argued above that the kernel of ownership is found in the right to exclusive use of a thing. The right is established when a given legal system institutes the complex right - duty relation in respect of a thing which results in the capacity of individuals to have legally exclusive control of a thing for a certain more or less definite purpose and for a definite or indefinite time. This involves postulating the existence of rules whereby the right of ownership is "set up, or we might say 'instituted', by the performance of some act or the occurrence of some event".¹³ Such events and occurrences the law treats as

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10. Bowen, E., "The Concept of Private Property", Cor. L.Q. 1925, p. 42.
Cohen, F.S. "Dialogue on Private Property", Rutgers L.R., 1954, p. 370.
 11. Holland, T.E., Jurisprudence, London 1900, p. 179.
 12. Ely, R.T., Property and Contract in their relations to the Distribution of Wealth, London 1914, p. 136. (Hereinafter this book is cited as Property and Contract).
Sethna, M.J., Jurisprudence, Bombay 1973, p. 440.
Hobhouse, T.L., "The Historical Evolution of Property in Fact and in Idea", in Property, Its Duties and Rights, London 1913, p. 6. (Hereinafter this book is cited as Property.)
 13. MacCormick, D.N., "Law as Institutional Fact", 90 L.Q.R., p. 106.

operative to establish the institution of ownership or rather, to vest in some individual 'ownership' of some identifiable 'thing'.

The existence of a normative order is essential for establishing the institution of property. It is only when such a frame-work of norms exists that the institution of property comes into existence in a fully developed form. Thus to say that a given legal system has an institution of property is to accept that it has such a frame-work of norms. The exact description in time, nature, and extent of a right carries with it a description of the mode in which it is terminated, because it is terminated only because by its very nature and limits, it cannot go on for ever. As Professor MacCormick, while explaining the structure of institutions remarks:

They are set up, or as we might say 'instituted' by the performance of some act or the occurrence of some event and they continue in existence until the moment of some further act or event.¹⁴

In the final setting up of the institution of property, the sub-division of legal rules can, thus, be analysed as follows:¹⁵

- 1) Institutive rules;
- 2) Consequential rules;
- 3) Terminative rules.

The point that is generally stressed is regarding the variation in legal consequences of ownership in different legal systems. For example, in one legal system alienation is allowed, whereas in others

14. Ibid, p. 106.

15. Ibid, pp. 106-107.

it is restricted or not allowed at all. These variations in legal consequences are the results of differences of social systems in which legal systems are to operate and whose values and ends they are to further and maintain. Since all laws are conditioned by social circumstances and legal systems represent one of the aspects of social systems, the content of legal systems varies according to the differences between different social systems. The centre of gravity of the legal systems lies in the social systems in which they operate. Thus the legal consequences that follow in a given legal system from given legal institutions are not necessarily the same in all the legal systems. It is the absence or presence of different legal norms that differentiates the legal institutions of different legal systems which maintain different types of values towards which the legal norms are directed. For example, differences in property norms represent different values operative in Russia and China as against those operative in France and Germany. The difference lies in the legal norms that establish the institution of property and the ends or values towards which the legal norms are directed. And ends or values to be maintained or achieved in various societies vary according to the political and economic needs of the society. Thus differences in social structures will make the differentials in legal consequences co-existent with the social variations without necessarily presenting any apparent or real contradictions. Thus the variations in the intensity and extensivity of the legal consequences of ownership from society to society do not represent the absence or presence of the institution of property but the presence of a more liberal or a more restricted conception of ownership.

It has been stated above that the kernel of ownership resides in right to exclusive use of a thing; this can be termed 'the primary element of ownership'. If a legal system is to maintain an institution of property, the right of individual persons to exclusive use of specific things for a more or less specific purpose, and for definite or indefinite time must be secured as one of the legal consequences of 'ownership'. If a legal system abolishes all the legal consequences of ownership except right to exclusive use of a thing, it still has an institution of property. But if it abolishes the right to exclusive use of a thing (or class of things), it abolishes the institution of property itself in respect of that thing (or class of things). But there are certain legal consequences which are not the same in all legal systems but vary from system to system as a result of different values to be pursued and furthered by the legal systems. Such legal consequences can be termed 'secondary legal consequences'. For example, certain legal systems allow alienation in all forms, whereas others allow it only in certain restricted forms. Similarly the number and nature of objects of ownership vary from system to system. Thus in contemporary Russia, land and other means of production are withdrawn from personal ownership, while in India and United Kingdom there is no such general restriction.

Referring to these two elements of ownership, Professor Zitting states:

The content of ownership, in the general sense, consists of elements lying on different levels. The owner's right refers, on the one hand, to the use of an object, and, on the other hand, to his legal competence

to transfer ownership.¹⁶

Thus one can state that the primary element of ownership is the general rule of ownership whereby legal analysis defines ownership; the secondary elements indicate the functional role that is ascribed to ownership. Without distinguishing the primary and secondary legal consequences of ownership one cannot establish a generally applicable meaning of ownership. Unless such a generally applicable meaning of ownership is established, comparison of different forms of ownership in different societies is impossible.

In the present day industrial, commercial, and trading societies, the analysis of the concept of property is taken in the broadest sense to include both primary and secondary legal consequences. It is at this point we can shift the focus of our attention from the purely primitive meaning of property that refers only to the right to exclusive use of a thing to the fully developed legal system that refers both to primary and secondary elements of ownership as constituting the institution of property and enables one to understand and articulate more clearly the point made by those who regard ownership as a bundle of rights.

Legal Concept of Property whether a Single Right or a Bundle of Rights.

A sharp dispute exists as to the contents of ownership. The Roman law distinguished three rights as component parts of ownership:

16. Zitting, S., "An Attempt to Analyse the Owner's legal Position", Scandinavian Studies in Law, 1959, p. 229.

ius utendi, ius fruendi, and ius abutendi. The Romans distinguished them as products of analysis, they did not favour their separation in practice except in relation to a limited class of jura in re aliena. These component parts are functional or administrative units rather than having separate existence. But this characteristic of the concept of ownership is often misconstrued. Instead of taking this deductive approach, the concept is inductively construed as an aggregate or bundle of these rights. The component parts described above neither constitute ownership nor give rise to ownership but are in the nature of proprietary rights which can be granted by the owner to others by virtue of the fact that he is owner. Anyone having an interest less than ownership should not be considered as an owner of property but as having proprietary rights - rights which the owner grants to others without losing his general right of ownership.

Pollock says "what we call the law of property is, in the first place, the systematic expression of the degrees and forms of control, use, and enjoyment, that are recognised and protected by law".¹⁷ Similarly Blackstone enumerates three rights of property - right of free use, enjoyment and disposal of acquisitions.¹⁸ Pound, however further dissects the right of ownership into six sub-rights.¹⁹ Kruse makes his own assessment and expresses the opinion that "the right of property is a definite set of powers", and calls this set of powers, "the

17. Pollock, A First Book of Jurisprudence, London 1929, p. 172.

18. Blackstone, Commentaries on the Laws of England, Vol. I, London 1830, p. 138. (Hereinafter this book is cited as Commentaries.)

19. Pound, R., "Legal Rights", Int. J.E. vol. 26, 1916, p. 101.
a) ius possidendi; b) ius utendi; c) ius fruendi; d) ius abutendi;
e) ius disponendi; f) ius prohibendi.

normal conception of the right of property".²⁰ But of all such rights, there is only one which seems fundamental to the idea of ownership, the single right of exclusion. One has property in the car one drives; one's property is not the car, but the right one has in it - the exclusive use of it. Exclusion is the life essence of property. Rights mentioned by the above authors are pertinent but to come directly to the point, it seems that the idea of exclusion is the differentia, all other rights though not essential, are important.²¹ The variability of rights from place to place and from time to time which go to make the so called bundle of rights, is in itself a sufficient proof that their enumeration depends on social and economic situations.²² Ownership as an institution can be destroyed not by destroying or varying these rights, as enumerated above, but by one and only one method and that is of abrogating the right of exclusion. The rights in the bundle are only the functional and administrative adjuncts of the right of exclusion. The rights in the legal

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20. Kruse, V., The Rights of Property, vol. i, pp.107-108.
 a) The power internally to dispose actually of and exploit the object or good;
 b) A power to alienate, pledge, or otherwise by declaration of will to dispose of the good, to contract rights in it of the most varied nature;
 c) Power to use the good in question together with the owner's other goods as a basis of credit for his entire business and all obligations arising herefrom;
 d) Hereditary succession.
21. Bowen, E., "The Concept of Private Property", 11 Cornell Law Quarterly, pp. 41-42.
22. Pollock holds that the list of property rights is not exhaustive "possibly it may turn out to cover more, if we give the widest acceptable sense to the word Property; but it is this at the very least". op.cit. p. 172.
23. Philbrick, F.S., "Changing Conceptions of Property in Law", U. Penn. L.R., 1938. pp. 691-92.
 Hallowell, "The Nature and Function of Property as a Social Institution", J.E.P.S. vol.i, 1943, p. 123.

system are not individually necessary, and if a particular legal system does not admit them, it does not mean that it does not know ownership. But if a particular legal system does not admit of the right of exclusion, one can conclude that that system does not recognise ownership. Thus ownership hinges on the 'right of exclusion'.

Under common law systems, the concept of real property is based on the relation between a tenant and his land-lord.²⁴ One could not ignore this relation. Though the common law notion of property based on the idea of relation, to my mind, can yield a satisfactory and workable account of the concept of ownership, yet it is a cause of confusion that English law looks at ownership by breaking it up into fragments. English law starts with the component parts and brings them together in a way which misreads the right of property as a collection of fragments. This involves ignoring the basic truth that the fragments are derivative and not separate and independent²⁵ elements of ownership. The resulting fragments of the right of property are themselves sometimes classed as constituting property rather than

24. Dr. Kahn-Freund states:

The living law of this country [England] knows nothing of an abstract definition of property in terms of a relation between persona and res.

Introduction to Renner, K., The Institutions of Private Law and their Social Functions, London 1949, p. 18.

25. Separate here means the existence of a right apart from the legal right of ownership, that is, existence without the cooperation of the legal right of the owner.

Independent means when derivation from the legal right of property does not affect the legal right of the owner of the burdened property.

classed as proprietary rights.²⁶ Fragments create different degrees of ownership and these degrees of ownership considered together give the notion of a bundle of rights. Professor Honoré says that "it is fashionable to speak of ownership as if it were just a bundle of rights".²⁷ And Professor Rudzinski concludes that the idea of bundle of rights constituting ownership "suggests that the rights included in ownership are somehow accumulated and added one to another in a haphazard manner like sticks in a bundle or coins in a purse."²⁸

Lawson concludes: "Roman law thinks of ownership as a single whole which can to some extent be split up. English law starts with the component parts and brings some or all of them together."²⁹

So the concept of ownership as a bundle of rights is based on the fallacious notions discussed above which the writers commit in framing a concept of ownership both out of Roman law and English common law. It is this fragmentation of ownership or rather the constant

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26. The distinction between property and proprietary rights is basic to the understanding of the nature of property. Property is exclusive independent right but proprietary rights though exclusive are yet derivative from the former. Lawson realises these difficulties and remarks, "One of the greatest difficulties encountered by students of property law comes from the English habit of splitting what may in a general way be called ownership into its component parts and making of each of them an abstract entity which, if not quite the same as a thing, is not very different."
- Lawson, F.H., Introduction to the Law of Property, Oxford 1958, p. 59.
27. Honoré, A.M., "Ownership" in Oxford Essays in Jurisprudence, Edited by A.G. Guest, London 1961, p. 113.
28. Rudzinski, A.W., "A Comparative Study of Polish Property Law", in Polish Civil Law, vol.i, edited by D. Lasok, 1973, p. 57.
29. Lawson, op.cit., p. 9.

occurrence of the fragments in varying contacts with each other, which is the cause of the misconception of the bundle of rights as constituting property.

Markby's remarks point to this conclusion:

If all the rights over a thing were centred in one person, that person would be the owner of the thing: and ownership would express the condition of such a person in regard to that thing. But the innumerable rights over a thing thus centred in the owner are not conceived as separately existing ... all the various rights which an owner has over a thing are conceived as merged in one general right of ownership.³⁰

And Markby further remarks:

Ownership ... is conceived as a single right, and not as an aggregate of rights. To use a homely illustration, it is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops. Yet, as we may take a drop or several drops from the bucket, so we may detach a right or several rights from ownership.

The distribution of rights detached from ownership which we actually find in use is very extensive ... yet ³¹pp one of these persons would be considered as the owner.

The very use of the word 'property' itself leads me to believe that it is a single right. Second, the origin of the concept of property, when the modern economic and administrative techniques were not known, points to the idea of ownership as a unitary concept. As Amos points out:

The difficulty of nomenclature is really brought about by the fact that, with respect to large classes of things, as land, houses, farming stock, plant for manufactures, negotiable instruments, and furniture, a distribution of the rights included in ownership is far more common than unity of ownership. In

30. Markby, W., Elements of Law, London 1889, p. 154.

31. Ibid, pp. 155-56.

primitive society, unity of ownership is for all things almost the only form of ownership known ... Thus, in order to ensure precision of meaning, either a new term must be substituted for the term owner, or a new meaning put upon this term.³²

Third, as seen in the analytical structure of ownership, the concept itself reveals its single character in its central element, the 'right of exclusion'.

If we take property as a bundle of rights, rather than a single right, the following two possibilities are to be considered:

1. Either the rights constituting the bundle are independent of each other, or
2. They are dependent:
 - a. either closely related to each other, or
 - b. relative to something.

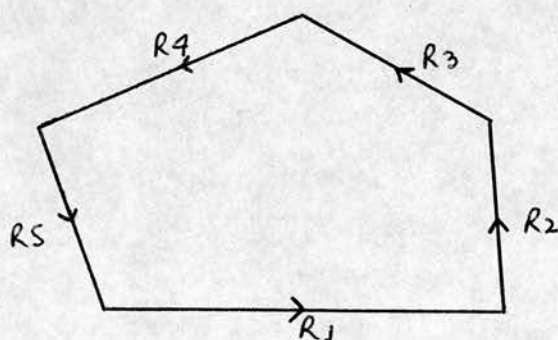
1. If rights over things are independent of each other, we have to face the following dilemma. If ownership consists of a bundle of rights, let us suppose the bundle consists of six rights. (Even if we take property to comprise an infinite number of independent rights, since there can be an infinite mode of expressing property, the argument I advance still holds good.) Suppose a man is an owner with all the six rights. He alienates five of the rights from the bundle. Now six people will be holding equal rights independently of each other. Nobody has a claim to be called owner since each has a single right and not a bundle - not even the original holder of ownership, since he is left with a single right rather than a bundle of rights. There is no way to find who is the owner. Such a position becomes self-contradictory.

32. Amos, S., The Science of Law, London 1874, pp. 181-82.

And if the legal system starts treating each as owner and starts bestowing them with powers as wide as those of the original owner with his bundle, the contents of each right will provide a new starting point for investigation as a 'res' capable of separate ownership.

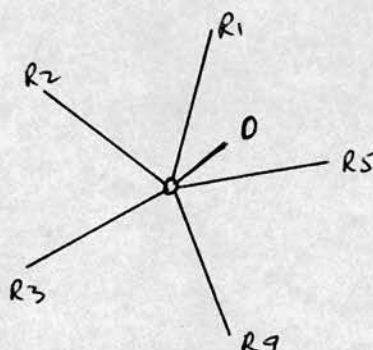
Therefore the proposition of a bundle of independent rights constituting ownership is futile. The so called rights constituting the bundle constitute the periphery of the structure of ownership, its outer shell.

2. If the rights are closely dependent then their relation with each other will be a dominant relation. In this case ownership becomes a unitary and indivisible metaphysical entity in which all the rights are submerged. The owner will only be a person who possesses all the rights. A man cannot alienate any of his rights. He can divest himself of the whole ownership, but he cannot transfer any single right. Such a concept will lead to practical difficulties. No system or doctrine can stand on its own feet unless it is built on man's basic needs and purpose. There will be no lease, no mortgage, or no trust. This may be illustrated diagrammatically.



2b. The second possibility is, if we regard rights as relative - relative to one right of ownership. Does it give some relief? At least

by this we can get rid of metaphysical indivisibility. And to reach an end we have to postulate something to which all these rights are related. Though this postulate is an abstraction, "It is to this that we always revert when we are trying to form a conception of ownership."³³ It is this ultimate core to which all the rights are related. The bundle of rights depend on this core. This idea can be represented by a sketch as below:



Ownership is conceived as a single right and not as a bundle of rights. The rights which are drawn from this core right vary from system to system, the variations being explicable in terms of the various socio-economic conditions within which a legal system functions. That is why the rights drawn from the core right are found variable in different cultural contexts and appear in different combinations and with various restrictions when we move from one society to another. This is the view that Markby takes:

The innumerable rights over a thing thus centred in the owner are not conceived as separately existing. The owner of land has not one right to walk upon it, and another right to till it; the owner of a piece of furniture has not one right to repair it, and another right to sell it: all the various rights which an owner has over a thing are conceived as merged in one general right of ownership.³⁴

33. Markby, W., op.cit., p. 155.

34. Markby, op.cit., p. 154.

It would not be strange to find a piece of land over which A has a right to till, B has a grazing right, C to take water from the spring, and D to hold it for security. No one of these would be considered as an owner. Since all these rights are derivative and drawn from a single right of ownership, they can be termed as partial rights of property. Sometimes these partial rights come to be treated as being 'things' subject to ownership themselves as Lawson states:

The reason why the property lawyer turns all these rights and interests into things, however abstract they may be, is that since they have value, people are willing to buy them; and any valuable asset which is the object of commerce is properly treated as a thing, just as ... physical object such as a ship or a motor car.

In this conception of ownership there is a swarming of distinctive rights. After all rights have been derived from ownership though ownership is gradually reduced, the owner is still in a different position than other persons. "However numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of this residuary right whom we always consider as the owner".³⁶ Markby further remarks:

So long as the rights I have mentioned are in the hands of any other person they have a separate existence, but as soon as they get back into the hands of the person from whom they are derived, as soon as they are 'at home' as it were, they lose their separate existence, and merge in the general right of ownership. They may be again detached, but by the detachment a new right is created.³⁷

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35. Lawson, op.cit., p. 16.
 Pollock, A First Book of Jurisprudence, p. 133.
36. Markby, op.cit., p. 156.
37. Markby, op.cit., p. 156.

Here Markby may be right, but I essentially differ from him. The rights which are in the hand of others are not independent rights³⁸ because they are limited and lacking the essential advantage which an owner would have. For instance, a lease holder is the owner of the lease and not of the land. Second, he cannot use his right as freely as an actual owner. He cannot sub-lease for a period longer than his lease. So it is wrong to speak of derivative rights as independent or of separate existence. To admit their separate existence is to accept the theory of bundle of rights which I have already rejected along with Markby. So by accepting their separate existence Markby is contradicting his own theory. There is a difference of degree between property and proprietary rights as already pointed out. The difference of degree is infinitely varied and sufficient to account for all the apparent differences between property and proprietary rights.

Ownership is a whole absorbing within itself all the diversities. A unity within diversity; on which all the subsidiary rights depend and rely, but which is a legal right in itself.

'Property' whether relation between a person and a thing
or relation between a person and other persons

Analysis of the law of ownership has for its immediate object to ascertain the dual aspect of the relation if any between the owner and the thing and the relation if any between the owner and the third person. Traditionally ownership has been defined in terms of the singular aspect

38. Pollock, A First Book of Jurisprudence, p. 195.

of the relation between the owner and the thing. Blackstone refers to ownership as a "sole and despotic dominion which one man claims and exercises over the external things of the world."³⁹ Similarly Austin says that property is "A right over a determinate thing".⁴⁰ But the relevant relation between a person and a thing is simply his physical ability to use it. This relation can be called an extra-legal relation and is clearly not in itself ownership.⁴¹ It is like the physical ability mentioned by Bentham:

The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals.⁴²

Confusion of this physical relation with a legal relation can be traced back to two reasons.

1) The Roman idea of near absolute concept of property, such that the individual can do whatever he likes with his object of property.

2) The confusion between 'property' as signifying object of property and 'property' as signifying the right(s) of property. Often in ordinary speech the meaning of 'property' is confined to the object of property.

The argument which will here be put is that property is essentially a relation between persons with respect to objects. Every one has the physical ability to interfere in some degree with the owner's

39. Blackstone, Commentaries, vol. ii, pp. 1-2.

40. Austin, Jurisprudence, edited by Campbell, London 1873, vol. II, p. 818.

41. Newark, F.H., "The Taking of Property without Compensation", N.I.L.Q., 1940, p. 172.

42. Bentham, J., Theory of Legislation, p. 113.

use of an object, but only the law can confer the right so to interfere. The relation between the owner and the third person depends on the presence or absence of a legal right of the third person to interfere.

Thus, I own a dog. I can beat it, tie it up, starve it, paint it green or do any other of the numberless things within my physical ability. The law may forbid cruelty to animals, but I can still do these things, for the law is impotent to interfere with the purely physical relation between my dog and myself. Even if the law forbids cruelty on pain of confiscation the situation is not altered. The power of law is limited to the ability of its officers, and the ability of a constable to take my dog from me is no greater than the ability of any dog thief. The only effect of legislation forbidding cruelty to animals or ordering confiscation of them is an effect on the legal relation existing between third persons and myself with regard to my dog."⁴³

And the point is that normally when one person is legal owner of an object, no one else has a right to interfere with it or with his use of it.

The distinguishing character of property is not the relation between the individual and the object, but the right of the individual to exclude others from his physical relation with the object, or indeed from the object itself. It is this right to exclude others which is fundamental to the idea of ownership. As Cohen expresses it:

Whatever technical definition of property we may prefer, we must recognise that a property right is a relation not between an owner and a thing. A right is always against one or more individuals. This becomes unmistakably clear if we take specifically modern forms of property such as franchises, patents, goodwill etc., which constitute such a large part of the capitalised assets of our industrial and commercial enterprises.⁴⁴

Amos makes a similar observation that

43. Newark, op.cit., p. 172.

44. Cohen, M.R., Law and the Social Order, New York 1933, p. 45.

A law of ownership has, for its immediate object, to ascertain the relations of persons towards each other in respect of the possession or use of things.⁴⁵

So is the view of Holland when he expresses that

The essence of all such rights lies not so much in the enjoyment of the thing, as in the legal power of excluding others from interfering with the enjoyment of it ... The relation is between him and other people whom he excludes from the thing.⁴⁶

When Bentham states that

The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession. If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law;

his statement points to the existence of legal relations between persons.

Thus when Bentham states that "property and law are born together, and die together,"⁴⁸ he means that property is essentially a relation created by law, and the relations which law can create are relations of a particular kind between persons.

Kelsen adopts the same view,

If the right is a legal right, it is necessarily a right to somebody else's behaviour, to behaviour to which the other is legally obligated.⁴⁹

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45. Amos, The Science of Law, p. 159.
 Vinogradoff, Common Sense in Law, London 1946, pp. 49-50.
 Ely, R.T., Property and Contract, vol. i, p. 96.
46. Holland, *op.cit.*, p. 179.
47. Bentham, *op.cit.* p. 113.
48. *Ibid.*
49. Kelsen, General Theory of Law and State, New York 1961, p. 75.

Although Lawson states that ownership is a relation between a person and a thing, the qualification which he adds is all important. He states:

If I say that I own a specific motor-car, my statement is complete; no other ascertained person need come into the relation. Such a relation is a relation between a person and a thing, and lawyers call it a real relation ...

In one sense, indeed, even real relations are relations between persons. Real relations would be very imperfect if they were not protected and guaranteed by law. The statement that I own Blackacre - to use a name given by lawyers to a typical, but fictitious piece of land - implies that other persons must not do anything inconsistent with my ownership, and also that I may bring an action against anyone who is guilty of such an act.⁵⁰

Professor Honoré, however, expresses the view:

When a person has a right to exclude others generally from tangible property or from interfering with the exercise of a right over tangible property he stands, legally, in a special relation to property. It is entirely natural and unobjectionable to call his right a right to the thing or to the use of a thing or over a thing. Yet we would not say a person had a right to a thing unless he was protected by claims excluding persons generally from interfering with it. A right to a thing or its use or over a thing is protected by claims against persons but is not to be identified with them. When we think of the purpose for which the right is given, we think of the holder's relation to the thing. When we think of the mode of protection, we think of his relations to other persons. The two are complementary.⁵¹

Professor Honoré's idea of splitting ownership into a right over a thing and the protection of a right by legal claims, which two are not to be identified, is true. But the two are interchangeable in such a way that their splitting is not possible. The 'protection of a right' is a duty imposed on others but it is accompanied by the right of the duty

50. Lawson, F.H., The Law of Property, Oxford 1958, pp. 1-2.

51. Honoré, A.M. "Rights of Exclusion and Immunities against Divesting", *Tul.L.R.*, 1960, pp. 463-464.

holders to non-interference by the owner. Thus the owner has also a duty not to illegally interfere with the right of others. This can be illustrated as follows:

A's right of property corresponds to the duty of B, C, D ... not to interfere with A's use of the property object. It is also true that A's right is accompanied by a duty on his part not to use the property contrary to law, or so as to interfere with the right of B, C, D ... This duty on the part of A is a restriction on his conduct restraining him from using his property in such a way as ^{not} to infringe the right of B, C, D ... This restriction is not justified in terms of his relation to the object as such, it is a restriction on his conduct in the use and disposal of the object justified in terms of his relations with other people. Since the owner's right is normally concomitant with such a duty, it would be absurd to say that he derives either his right or his obligation from the object. ⁵²

Since according to Professor Honoré a right over a thing and the protection of a right are not identical, one must presume them to be different, and hence separable. But as soon as one thinks of their separation, the very concept of ownership falls assunder. Ownership will then be that of a savage in Bentham's term. The raising of the

52. Kant says that there can be no relation between a person and an object

Otherwise, I would have to think of a Right in a Thing, as if the Thing had an Obligation towards me, and as if the Right as against every Possessor of it had to be derived from this Obligation in the Thing, which is an absurd way of representing the subject.

Kant, The Philosophy of Right, Edinburgh 1887, p. 86.

very question of identification is wrong. Things are said to be identical or different only when there arises a question of comparison between two things. In ownership it is not a question of comparison between a right over a thing and a protection of a right. Nor is it right to say that both are complementary; both are interchangeable terms and are to be understood as such to the very idea of property.

In the case of ownership the right over a thing and its protection by claims (duty) are interchangeable. Ownership is the consequence of this right-duty relation in relation to a thing. Ownership is instituted by law as a relation among persons⁵³ such that the so called owner in law excludes others from certain activities with reference to the object of property.⁵⁴

If we considered property solely as a relation between an

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53. Kant holds the view that there can be no real relation between a person and a thing because

A man entirely alone upon the earth could properly neither have nor acquire any external thing as his own; because between him as a Person and all external Things as material objects, there could be no relations of Obligation. There is therefore, literally, no direct Right in a Thing, but only that Right is to be properly called 'real' which belongs to anyone as constituted against a Person.

Ibid.

54. Turner, J.W.C., says ownership

Is a relation between people, between the owner and the rest of the world.

... but what I do to the thing I own, in the exercise of right of ownership, is a concrete visible matter easily perceived. Hence the mistaken, but universal, notion that ownership is some close relation between the owner and the thing owned.

"Some Reflections on Ownership in English Law", Can. B.R., 1941, pp. 342-343.

Cohen, F.S., "Dialogue on Private Property", Rutgers Law Review 1954, p. 373.

individual and an object, an analysis of the concept would give no indication as to its social function. Although concept functions in society, its social function would be purely contingent. But no social institution, such as property, can be understood except by understanding how it is based on man's outlook on life, its meaning and purpose.

The approach here advocated emphasises the regulating aspect of the legal system in its treatment of ownership, and emphasises relations between people as being the only significant legal relations.⁵⁵

Legal relations in our law exist only between persons. There cannot be a legal⁵⁶ relation between a person and a thing or between two things.

How to find an owner when two or more people have a right in rem over the res.

In various types of legal order, there can be a series, and sometimes a long series, of persons who severally have rights over the res. Thus it is not strange to find a piece of land over which A has a right to till, B a right to walk, C a grazing right, and D a right to hold it as a security for debt. Yet not one of these persons is considered an owner. All these persons are using the same land. But what is that which distinguishes the owner of a piece of land from A, B, C and D? Not only is the person called owner when he has all the rights over a thing, he may still be called an owner even though many of these rights are held by other persons. They are, it is true, parts of a totality,

55. Corbin, A.L., "Jural Relations and their Classification", 30 Y.L.J., 1921, pp. 226-227.

56. Restatement of the Law of Property. American Law Institute, pp. 3-11.

segments stripped off from a core.⁵⁷ This points to the conclusion that while other segments may have no relation to each other, all must be related to the core. The core is, therefore, not a mere disconnected residue. It is the skeleton upon which the whole complex of fractions or segments of property depends. It may remain insignificant, the least valuable right of all, involving no right to benefit by the present use or possession of the thing, but the whole complex hinges upon ownership as the core right. It is presupposed by the derivative rights. In it reposes the individuality. There is, therefore, something special about the core right which gives the owner some special advantage over others. We need therefore to find the special characteristic of the advantage which an owner enjoys over others with lesser interests.

Different writers advance different arguments to find the special advantage or characteristic of the right which an owner enjoys over others. Some of the criteria developed for the purpose are as follows.

Turner suggests that the special characteristic of the right of an owner can be ascertained as follows:

If a man is to be owner of a thing he must have at least one right in rem in respect of it which will still exist even though all the other rights in rem in respect of it which are vested in other people may perish. An owner must have some advantage over all other people: and this enduring characteristic of his right in rem is the essential advantage which he must have: when the other rights in respect of that thing have perished, no matter how, his will still remain unaffected by their destruction. The utmost, then, that can be said is that ownership is such right in respect of property as law from time to time invests with the characteristic that

57. This point is more fully discussed under the heading of - property as a single right or a bundle of rights.

it will endure after all other rights in respect of the same property have perished.⁵⁸

He makes duration the criterion for judging owner from holder of other lesser rights. He maintains that the right of the owner outstrips and outlasts all other lesser rights which the owner grants to other persons. But here it can be pointed out that the right of easement endures along with the right of the owner. It is a transmissible and indeterminate right.⁵⁹

Markby suggests a new criterion to find an owner. He expresses the view:

However numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of this residuary right whom we always consider as the owner.⁶⁰

Salmond expressed a similar view when he stated:

In as much as the right of ownership is a right to the aggregate of the uses of the thing, it follows that ownership is necessarily permanent. No person having merely a temporary right to the use of a thing can be the owner of the thing, however general that right may be while it lasts. He who comes after him is the owner; for it is to him that the residue of the uses of the thing pertains.⁶¹

Similarly Pollock states:

the owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often there is no such person. We must look for the person having the residue of all such power when we have accounted for every detached and limited portion of it; and he will be the owner even if the immediate power of control and use is elsewhere.⁶²

58. Turner, J.W.C., op.cit., p. 352.

59. Honoré, A.M., "Ownership", in Oxford Essays in Jurisprudence, p. 126.

60. Markby, op.cit., p. 156.

61. Salmond, Jurisprudence, London 1947, p. 426.

62. Pollock, A First Book of Jurisprudence, London 1929, p. 180.

The special characteristic of the owner's right is that it is a residuary right. Though an owner may 'detach' various rights over the res in favour of others so that right is greatly reduced and may be less valuable than the detached rights, none-the-less this residuary character of his right, leaves him with the right of ownership. From this it follows that the owner has no more than the reversioner's right and his right is "the most ultimate right of possession and nothing else".⁶³ If this is so, then it may appear that the state, not the so-called owner, has the ultimate residuary right and is thus 'owner' of everything. Thus the whole property in legal systems would appear to be vested in the state as the residuary to all property. The law of escheat also points to this conclusion; when all interests of ownership terminate, the state is the ultimate residuary. But to draw this conclusion would be wrong because it depends on a confusion between (a) the residuary character of the right of ownership, and (b) the ultimate destination of that right, having that character, which ultimate destination is determined by the law of succession. This enables us to answer a question raised by Professor Honoré:

Can we then say that the 'owner' is the ultimate residuary? When the sub-lessee's interest determines the lessee acquires the corresponding rights; but when the lessee's right determines the 'owner' acquires these rights. Hence the 'owner' appears to be identified as the ultimate residuary. The difficulty is that the series may be continued, for on the determination of the 'owner's' interest the state may acquire the corresponding rights; ⁶⁴ is the state's interest ownership or a mere expectancy?

63. Kocourek, Jural Relations, Indianapolis 1928, p. 328.

64. Honoré, "Ownership", in Oxford Essays, p. 128.

Holland, however, does not give a clear indication regarding the special advantage enjoyed by the owner as compared to the holder of lesser interests, yet keeps himself vague and makes a cautious approach towards the right of ownership. He states:

The right of ownership is, however, unlimited only in comparison with other rights over objects ... It may ... continue to subsist although stripped of almost every attribute which makes it valuable.⁶⁵

To the various attributes of an owner adheres the right of disposition which carries with it the right (privilege) of alteration or destruction and the right (power) of alienation though the latter is restricted in certain cases. In its legal aspect it includes the right of possession and vindication except when the former is expressly severed, as in the case of lease, loan, or mortgage.⁶⁶ Holland thus avoids the two characteristics discussed above namely, duration and ultimate residuary character. His observation that on the one hand the right of the owner is unlimited only in comparison with the rights granted to others by the owner, and on the other, the right of the owner is limited by the right of the state and the individuals in general, leads one to conclude that the characteristic or advantage enjoyed by the owner over rights granted to others is to be found within the compass of owner's ability to show his plenary control over the object,⁶⁷ however tenuous it might be. Such a control can only be shown if the owner has a right of vindication and possession. Possession, however, is not necessary as in the case

65. Holland, Jurisprudence, London 1900, pp. 194-195.

66. Ibid, pp. 194-95.

67. Ibid, p. 194.

of lease and mortgage. When an owner has a legal right to claim the lesser rights granted to others and his control over the rest is plenary, he is in an advantageous position as against the rest of the lesser right holders. The legal right to vindicate is the special character of the owner's right as compared with the lesser rights over the object. As Noyes puts it:

It is possible to reduce this so-called "ownership" to the right to vindicate the "ownership" (*nuda proprietas*), so that its only content is the right to claim itself ... It is that legal relation with respect to objects to which, when every constituent right is removed, something still remains. ⁶⁸

The distinction between property and personal rights.

Since the whole conception of property depends on relations, the question arises regarding the distinction between property and personal relations. Ely⁶⁹ uses the criterion of value - economic value as the characteristic of property rights. Professor Commons⁷⁰ also identifies property with economic value. According to Salmond⁷¹ property rights are those which have money value as opposed to personal rights which have no money value. In the first place property is not only an economic value, it has got an intrinsic value as well. A heap of rubbish in my house is of no economic value to anyone. But if anyone commits trespass, it is transgression of my property. Similarly, my barren land may be an economic burden on me, still if

68. Noyes, C.R., The Institution of Property, London 1936, p. 298.
 Pollock, A First Book of Jurisprudence, pp. 182-183.
 Kruse, The Right of Property, vol. i, p. 145.

69. Ely, R.T., Property and Contract, London 1914, vol. i, p. 132.

70. Commons, J.R., Legal Foundations of Capitalism, London 1968, p. 16.

71. Salmond, Jurisprudence, London 1947, p. 257.

any one trespasses, he is liable to me for that trespass. There can be property which is valueless in economic terms. Second, there are some personal relations which carry with them economic advantages, for example, the services of a wife or wife's right to a matrimonial home, are purely personal relations and in most legal systems carry none of the attributes of property. Hence the criterion of money value or economic value as a distinguishing mark between property and personal rights is not a fair criterion.⁷² To define property in purely economic terms is to ignore the sentimental or intrinsic aspect of property. Property is a subjective matter in its inception. As Jones expresses its "value may be sentimental as well as economic".⁷³

Another proposed criterion is that of transferability. This criterion follows from economic value of property because value in economics means exchange value. The criterion of alienability⁷⁴ which is one of the important incidents of property is particularly stressed, sometimes even treated as an essential feature, in the present commercial structure of society. We may ask if it is a sufficient criterion for distinguishing between property and personal rights. It is thought that property rights can be transferred but personal rights cannot be transferred. But there are certain rights which have been recognised as proprietary rights although they cannot be alienated. For example,

72. For a more detailed analysis of property as an economic value or money value, see chapter iii, where this criterion of property is shown as unsuitable to the true and real conditions of life.

73. Jones, J.W., "Forms of Ownership", Tul. L.R., 1947, p. 93.

74. Noyes, op.cit., pp. 346 & 433.

Snyder, O.C., Preface to Jurisprudence, Indianapolis 1954, p. 765.

under Hindu law, a woman's estate was under severe restrictions as to alienation. She was an owner in all respects but alienation. On her death property reverts to reversioners. So if we apply the transferability test certain property rights will be eliminated from the sphere of ownership. "All sorts of limitations have been and are placed both by law and by creators of property upon the privilege of alienation. When none is permitted it is obvious that the property dies with the person."⁷⁵ At the same time there are certain personal rights which are assignable. For example, rights under a contract of service in the case of 'retain and transfer' system in English professional football.⁷⁶

(On the other hand, of course, some rights which are guaranteed to the individual under law and which are purely personal, cannot be divested even with the consent of the right holder. For example, the doctrine of waiver does not apply to Fundamental rights under the Indian Constitution.)⁷⁷

Thus alienation is not an essential⁷⁸ character of property, albeit an important one. It does not serve as a universal guide in deciding between property rights and personal rights. The question of assignability depends on the state of law at any given time, and as such is not inherent to property.

75. Noyes, op.cit., pp. 433-34.

76. Cf. Eastham v. Newcastle United F.C. [1964] Ch. 413.

77. Constitution of India, Art. 13.
Noyes, op.cit. p. 434.

78. Noyes, op.cit. pp. 346 & 434.
Snyder, O.C., op.cit., p. 765.
Kocourek, op.cit., p. 332.

Another proposed criterion is that of survival. Salmond states:

Even as the generality of ownership involves its permanence, so its permanence involves the further essential feature of inheritance. The only permanent rights which can be owned by a mortal man are those which can be handed down by him to his successors or representatives on his death. All others are temporary, their duration being necessarily limited to the lifetime of him in whom they are vested. The right of ownership, therefore, is essentially an inheritable right. It is capable of surviving its owner for the time being. It belongs to the class of rights which are divested by death but are not extinguished by it.⁷⁹

It is thought that personal rights come to an end with the death of the person of inherence while the property rights survive the death of the person of inherence. But a woman's estate (under Hindu law as described above) which is her personal right comes to an end though her right is a property right as well. Inheritable quality is an important quality of the right of property but is not inherent in the nature of ownership.⁸⁰

Professor Honoré states this position by taking examples of license and easement. He states:

The owner has no power to divest himself of the duty to allow the licensee to go on the land (unless there is a term of the license to that effect). Hence he has no power to divest the licensee of his claim against himself (the licensor)

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79. Salmond, *op.cit.*, pp. 426-427.
 Honoré, "Rights of Exclusion and Immunities against Divesting", *Tul.L.R.* 1960.
 Noyes, *op.cit.*, p. 434.
80. Pollock states that the
 "Physical continuity is in no way essential to the identity and singleness of the rights existing over material objects. Physical discontinuity makes it, no doubt, easier to separate those rights and form new combinations."
Op.cit., pp. 131-32.

but he has power, by alienating the property, to divest the licensee of his right to go on the adjoining land, since the former licensee would then have no claim against the adjoining landowner to secure this right.⁸¹

His second example is of easement, of which he states:

In the case of the easement, the servient owner has a power, by alienating the property, to divest himself of his duty to the dominant owner, thereby divesting the dominant owner's claim against the present servient owner but not his right to go on the servient land, which is now protected by a new claim against the new owner.⁸²

In the case of a license the property right has come to an end by alienation but in the case of an easement the property right continues. Still we cannot say that the former is not a property right. Professor Honoré points out that on the basis of the survival test the distinction between property rights and personal rights cannot be maintained.⁸³ The owner's rights are, in general, immune from divesting without his consent but are liable to be divested by some special forms of alienation. For example, under the Hindu coparcenary system the manager, known as Karta, can divest all coparceners by alienating coparcenary property for legal necessity without the consent of other coparceners. Similarly a bona fide purchaser for value of trust property acquires it free of the trust provided he did not have notice of it, and this is a clear case of the divesting of the beneficiary's interest in the equitable property without his consent. The beneficiary can sue the trustee, but not the bona fide purchaser for value, for breach of the trust.

81. Honoré, *op.cit.*, Tul.L.R., 1960, p. 464.

82. *Ibid.*

83. Honoré, *op.cit.*, Tul.L.R., 1960, p. 466.
Noyes, *op.cit.*, p. 435.

The survival test is, thus, not adequate for distinguishing between property rights and personal rights. Noyes, while commenting on the survival test, states:

In reality the attribute of survival is one which attaches to the object and not necessarily to the property. If the object is consumed or destroyed the property disappears with it. The test of survival of its object is a true test of the persistence of property. But the test of survival of the⁸⁴ particular interest is not a necessary attribute of property.

Holland says that "Proprietary rights are extensions of the power of a person over portions of the physical world".⁸⁵ The right over things depends on the appropriability of things, corporeal or incorporeal. Thus property rights cover interests of whatever nature over corporeal or incorporeal things. The criterion involving right over things is pure and very simple to differentiate from personal rights which do not involve things, but difficulties have appeared with the introduction of contract in the sphere of property.⁸⁶ Contract is a personal relationship. But with the development of a complex industrial and commercial structure of society, the liberty of contract involving commercial and economic activities became property and, thus, gave to personal relations the colour of property. The main task is thus to make a distinction between contract as a personal right or liberty and contract as a form of property. Contract is liberty, a personal right, when it bears no relations to any specific object or group of objects.

84. Noyes, op.cit., p. 435.

85. Holland, Jurisprudence, London 1900, p. 178.

86. Pound, "Liberty of Contract", 18 Yale L.R., 1909, p. 454.

The mere fact that it involves economic activities does not make it a proprietary right unless that economic activity projects itself upon some specific object or group of objects. For example, a wife's claim for maintenance is not property and creates no interest in her husband's property. But it creates an obligation on the husband. Similarly, the services of a wife for her domestic activities are not property but are purely personal to the husband. Such activities even in the form of a contract are not property since they involve no specific interest in objects. They are general attributes of all persons whereas proprietary rights are particular attributes of individuals who have acquired some right over certain objects from some source. Noyes commenting on this distinction points out:

Thus personal rights are neither peculiar as to subject (person of inherence) nor do they relate to a material object, while property rights are always peculiar as to subject and relate directly to specific material objects or indirectly to indeterminate material objects.⁸⁷

The mere fact that an activity or an action is economic in nature does not make it property. To say that economic activity has always some indefinite relation to corporeal or incorporeal objects is not true. It is only when economic activity projects itself on objects that it relates to the class of acts which are proprietary. For example, if a man contracts to do labour for another and refuses to perform the contract, the action is a breach of contract and not a proprietary action. But if he performs the contract and does not get his wages, the action will be proprietary rather than breach of contract. Thus the former activity

87. Noyes, op.cit., p. 436.

remains personal liberty but the latter becomes proprietary because it concerns the delivery of particular interest in a specific object. Thus the former in their generalised form are not property rights but personal rights and the latter property rights.

What is a Thing?

In the study of the institution of property concerned as it is with things and their use, careful attention must be given to the notion of 'a thing'. In this there are two difficulties which tend to increase one another by their co-existence. One is that the concept of things at one time covers only physical objects, but at another time covers also the intangible subject matter of a right. The second difficulty is that, since all concepts derive their meaning from their general usage this very generality tends to impair their clearness and infect them with obscurity and make them difficult to assimilate. This obscurity and confusion is especially reflected in the word 'thing'. Allen expressed such views about the vagueness and obscurity regarding the word 'thing' and stated:

Probably there is no word in the English language so elastic and elusive as the word "thing". Its vagueness is well shown by the fact that we have recourse to it as a pis aller when we cannot discover any other term which precisely expresses what we wish to convey.

Similar views were expressed by Austin when he stated:

In drawing the line, by which Persons and Things are separated from Events, I content myself with vague expressions, and am far from aspiring to metaphysical precision. If I attempt to describe the boundary with meta-

88. Allen, C.K., "Things", Cal. L.R., 1940, p. 421.

physical precision, I should run into inquiries which my limits imperiously forbid, and which were scarcely consistent with the purpose of these discourses. If I endeavoured to define exactly the meaning of 'permanent object', I should enter upon the perplexing question of sameness or identity. If I endeavoured to define exactly the meaning of 'sensible object', I should enter upon the interminable question about the difference between mind and matter, or percipient and perceived. And, in either case, I should thrust a treatise upon Intellectual⁸⁹ Philosophy into a series of discourses upon Jurisprudence.

But these difficulties are quite misplaced, for the use of the word 'thing' represents a perfectly sensible distinction in its general usage and its technical usage in law. The distinction is to be better expressed and indeed more fully elaborated.

The controversy around which this obscurity and confusion is built up, is sometimes raised regarding the nature of a 'thing', the object of right. It is sometimes used in the corporeal sense and sometimes in the incorporeal sense. The question is how the same concept can be used in both corporeal and incorporeal senses? It is certainly inconvenient that by 'thing' we should mean at one time a merely physical object and at another time the intangible subject matter of some right. The use of the term in this sense at once involves one in a confusing and logically unsatisfactory identification of right with the object of right since both right and the object of right are abstract. Take the case of copyright - it is a right with respect to an incorporeal object. But in what sense is it a thing? It exists entirely in the abstract, a notion, something of a 'fiction' (in Bentham's sense of the term). It has not and cannot have any bodily identity. And any concept

89. Austin, J., Lectures on Jurisprudence, vol.1, London 1873, p. 369.

of that which has no bodily identity has been considered to serve little purpose in juristic science. Amos states:

The very essence of a Thing, for legal purposes, is that it belongs to the material Universe, that is, that it has a body, or is corporeal. Hence, strictly speaking, an Incorporeal Thing is a contradiction in terms ...

If the word Thing is to be of any real service either in Legal education or in the construction of a Legal System, the use of it must be severely limited to objects belonging to the material universe, capable of being apprehended by the senses, and every other sentimental, analogical, ⁹¹ or metaphorical abuse of the term must be rigidly excluded.

Similar views have been expressed by Austin and Salmond on the incorporeal nature of things. Austin states:

In the English Law, we have this same jargon about 'incorporeal things' ... rights of a certain species, or rather of numerous and very different species, are absurdly opposed to the things (strictly so called) which ⁹² are the subjects or matter of rights of another species.

Again he states:

The distinction is utterly useless; inasmuch as rights, and duties, having names of their own, need not be styled 'incorporeal things'.⁹²

Similarly Salmond states:

It is clear that if literally interpreted, this distinction is illogical and absurd. We cannot treat in this way rights and the objects of rights as two species of one genus. If we use the term in each case to mean a right, then the right of an owner of land is just as incorporeal as is that of his tenant. On the other hand, if the term is to be taken in each case to mean the object of a right, then the object of the tenant's right ⁹³ is just as corporeal as is that of his landlord.

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- 90. Amos, S., A Systematic View of the Science of Jurisprudence, London 1872, pp. 139-141.
 - 91. Austin, op.cit., Vol. I, p. 372.
 - 92. Ibid, vol. ii, p. 804.
 - 93. Salmond, Jurisprudence, London 1947, p. 273.

The jurists are almost unanimous in their views that the distinction between corporeal and incorporeal things is strictly and logically untenable. Nevertheless it has come about, in the course of the evolution of juridical ideas that certain rights in things and certain things, which have their being in juristic contemplation, are classed as incorporeal things. Salmond⁹⁴ says that the only way out of the difficulty is to recognise that in legal terms the word 'thing' may be applied not only to material objects but to every subject matter of a right whether a material object or not. To be consistent with the evolution of incorporeal things and the layman's appetite for things, the notion of 'things' was extended to express the nature of the subject matter of corporeal and incorporeal rights in terms of 'things'. Amos remarks:

In order to satisfy the popular demand for logical consistency, the supposition is favoured that some Thing or other Owned must be at the bottom of both classes of Rights. The Thing Owned not being visible, tangible, audible, or apprehensible by any of the senses, that is, not existing at all, is by a sort of humorous honesty⁹⁵ denominated an incorporeal thing.

'Thing' is defined as that which is not a person, but which possesses some degree of independence and some sort of title to exist in its own right and not as a mere adjective. Chambers Dictionary defines 'thing', as an entity of any kind ... that which is or may be in any way an object of perception, knowledge, or thought.⁹⁶

94. Salmond, op.cit., p. 273.

95. Amos, S., A Systematic View of the Science of Jurisprudence, p. 141.
Keesling, F.M., "Conflicting Conceptions of Ownership in Taxation", 44 Cal.L.R., 1956, p. 875.

96. Chambers 20th Century Dictionary, edition 1973, Edinburgh, p.1402.

This is a very broad definition which covers both corporeal and incorporeal things. But many jurists like Austin,⁹⁷ Salkoski,⁹⁸ etc. take the view that things are corporeal, while others like Salmond,⁹⁹ Hohfeld,¹⁰⁰ etc. would question this. If things are to exist, then where and how? It is with this inquiry that the present section is concerned.

A very common object of legal right originated in corporeal things. But the category of things has been greatly extended and has become exceedingly conceptualistic and complex. Not all the developments are consistent either with the original ideas or with one another. Nevertheless there is no need to discard the original time-honoured and widespread concept of things which identifies it with corporeal things. But the new conceptualistic development is to be explained to find its way in consonance with the old theory. If we consider that things exist in situations where there is nothing present, then it would be necessary to revise our notion of things. But this is a very rare and perhaps non-existent phenomenon. In all cases things exist, but how and where, is for us to search. In numerous instances where things are involved, something is there to characterise their existence. We have to find this characteristic to establish criteria of what counts as a 'thing'.

97. Austin, op.cit., Vol. I, p. 368.

98. Salkowski, C., Institutes and History of Roman Private Law, trans. E.E. Whitfield, London 1886, p. 333.

99. Salmond, op.cit., p. 272.

100. Hohfeld, W.E., Fundamental Legal Conceptions, edited Cook, W.W., London 1964, pp. 27-31.

Starting with things as corporeal objects Austin states:

Things are such permanent objects, not being persons, as are sensible or perceptible through the senses. Or (changing the expression) things are such permanent external objects as are not persons.¹⁰¹

Similarly Holland following some German jurists defines 'things' thus:

'a locally limited portion of volitionless Nature': perhaps better as 'a permanent external cause of sensations'.

The jurist need not go further than to lay down that a physical thing is something which is perceptible by the external organs of sense, and is capable of being so perceived again and again.¹⁰²

Things are volitionless for they cannot possess a will. These definitions recognise two elements, namely, physical existence and permanence. The things must occupy space. A thing to have any existence in law must possess some kind of continuing identity. As Salkowski states:

Thing in the juristic sense is, strictly, every portion of external nature which is limited in space, and subject to the control of the person.¹⁰³

Such an idea is not in consonance with the juristic thought since it ignores the idea of incorporeal things. Any one sided approach as discussed above will create a vacuum between legal science and the layman's approach to things. It will thwart the requirement that law should bring together common sentiments existing in society and juristic approaches to current social problems. We have to recognise as things all those objects, material or not, which have been recognised as valuable and advantageous to the individual in the same way as

101. Austin, op.cit., Vol. I, p. 368.

102. Holland, op.cit., p. 95.

103. Salkowski, C., op.cit., p. 333.

control over material objects is obviously valuable or advantageous. The analogy is that of the advantages drawn from material objects, not of the material objects themselves. It is these advantages which justify the classification of all sources of such advantage as 'things'. For example, copyrights, patents, etc. refer to something which can be advantageous and used in a similar way as material objects, though in the former cases there is no single specific material object involved. They can be used, restricted and made exclusive in much the same manner as in the case of physical things. Similarly in cases of claims connected with bonds, promissory notes, shares in a company, or book entries. As Allen says:

A thing is no less a thing in law merely because it is intangible; nor does it pass into the category of the "incorporeal" merely because it is intangible, for, as we shall see, incorporeal things are not such as possess an impalpable body, but such as possess no body at all, existing only in notion.¹⁰⁴

And Pollock states:

Hence it seems that in the case of incorporeal things the advantage or "group of advantages" enjoyed or to be enjoyed in fact is the true subject-matter of the right, and corresponds to the tangible object which we call a corporeal thing as distinct from the rights exercised over it.¹⁰⁵

Again in the class of incorporeal things are included certain rights and duties. Under Roman law¹⁰⁶ incorporeal things include inheritance, a usufruct, etc. and rights and duties of whatever description though the actual subject-matter may be corporeal. They were not prepared to

104. Allen, op.cit., p. 423.

105. Pollock, A First Book of Jurisprudence, London 1929, pp. 134-135.

106. Gaius, 2.14.

accept incorporeal things in the air, they had to be connected with corporeal things. These rights and duties were treated as things in much the same way as their economic importance. As Simpson states:

In the predominantly agricultural economy ... land and rights connected with land were equally important and so were equally protected by real actions of one sort or another. At this time the law of contract was rudimentary, but many transactions which might have been regarded as contractual were given legal effect by being treated, and conceived of, as grants of property - of course a contract can be thought of as involving the grant of choses in action, though this is not the way in which the modern lawyers do think about contract. Thus today if a farmer wishes to pasture his animals upon another man's land he will make a contract with him.

It was natural that these incorporeal rights, most of which were closely connected with land, should be governed by the same rules as land itself; it could hardly be otherwise. ¹⁰⁷

So the jurists who had developed some law about these rights and duties talked and thought of them as things rather than as rights and duties.

As Pollock states:

rights can be and are regarded in law as having distinct and measurable values, and whatever has such value is a thing, though not a bodily and sensible thing. ¹⁰⁸

He further states:

Thus we have a large and most important class of incorporeal things, and moreover things consisting in obligation, which are not only alienable, but more fully and freely alienable than almost every kind of corporeal things, and so connected with particular corporeal things. ¹⁰⁹

Blackstone explains this at considerable length and in a more lucid way when he states:

107. Simpson, A.W.B., An Introduction to the History of the Land Law, Oxford 1961, pp. 98-99.

108. Pollock, A First Book of Jurisprudence, p. 133.

109. Ibid, p. 221.

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditament: for they being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense: that casual share of the annual increase is not, till severed, capable of being shown¹¹⁰ to the eye, nor of being delivered into bodily possession.

The rights are abstract things though the things obtained by the rights may be corporeal, the obligation itself is incorporeal. It is recognised that these things are things which can be transferred and enjoyed as any other corporeal things. Simpson expresses such a view when he states:

It was recognised that they were a form of property which could be transferred by grant, and of which the grantee, by enjoyment, could indicate to the world the fact of his seisin, just as the tenant of Blackacre could show his seisin¹¹¹ to the world by visibly enjoying the fruits of his property.

These rights and obligations are regarded as things because

110. Blackstone, Commentaries, Vol. II, pp.20-21.

111. Simpson, A.W.B., *op.cit.*, p. 98.

they are considered valuable and worthy of exchange and commerce as corporeal things. Pollock puts the insignia of "elements of wealth",¹¹² "measurable values",¹¹³ "the advantages or group of advantages",¹¹⁴ on incorporeal things on the same level as we may put on corporeal things. Similar views are expressed by Buckland when he states:

In the institutional scheme a res is an element in wealth, an asset, an economic conception, essentially different from the Austinian thing, a permanent external object of sensation, which is a physical conception.¹¹⁵

It is, thus, not necessary that a thing is only that which has a physical existence. The idea of "things" is to be apprehended notionally, and for this notion to have some meaning in law it carries with it some value, advantage, or economic importance. As Allen states:

It is a quantitative identification of the economic value of a specific right. The value of the right may be, in economic terms, small or even scarcely measurable; but a value of some kind, it is believed, must be attributable to it if it is to possess the character of a thing in law.¹¹⁶

So what we have is a convenient metaphor whereby all legally protected advantages which are interpersonally transferable in law come to be included within the category of 'things'. The confusion arises when one identifies the right with the subject-matter, the widest power over the corporeal thing is so bound up with a piece of matter it controls that it itself has sometimes been regarded as a piece of matter.

112. Pollock, A First Book of Jurisprudence, p. 132.

113. Ibid, p. 133.

114. Ibid, p. 134.

115. Buckland, A Text Book of Roman Law from Augustus to Justinians, Cambridge 1963, p. 182.

116. Allen, C.K., "Things", Cal.L.R., 1940, p. 440.

Allen expresses the subject-matter relation to that of rights both in the case of corporeal and incorporeal things as follows:

By a corporeal thing we shall mean a right-object, or interest, which is apprehended in concrete substance by the senses. By an incorporeal thing we shall mean a right-object, an interest - not the same thing as the right itself - which does not thus embody itself in physical substance, but has to be apprehended notionally. ¹¹⁷

Smith warns against such a confusion and mistaken identity when he states:

To obtain a correct notion of an incorporeal thing, we must be careful not to confound together the profits produced and the hereditament or thing which produces them - the benefits arising, and the right from which they arise. ¹¹⁸

The confusion between corporeal and incorporeal things arose due to the origin of the idea and its evolution. In origin it must have been the case that the only subject-matter of ownership was the class of or some sub-class of corporeal things, but with later development other ideas like bills, promissory notes, copyrights, etc. crept in.

From the above discussion, this I think sums up the nature of things:

1) Any physical object which under a given legal system is regarded as a possible subject-matter of rights duties, is a corporeal thing.

2) Any interest, value, or advantage which the law treats as having continuing existence and identity distinct from that of any 'person', and as being the subject of rights and duties, and which if interpersonally transferable is

117. Ibid, p. 440.

118. Smith, J.W., A Compendium of the Law of Real and Personal Property, London 1877, vol.i, p. 5.

deemed to preserve its identity despite such transfer,
is an incorporeal thing.

3) Any right or obligation considered valuable and
treated as being transferable between persons without loss
of its identity is an incorporeal thing.

The utility of extending a schema (the law of property) which was first
worked out for regulating the direct control of specific physical objects,
to cover such other advantages, is obvious. The flexibility derived
from extending the category of 'things' from the purely concrete to the
abstract enables the legal system to serve a wider range of social
political, and economic policies. Lawson makes a very cogent and
practical observation when he states:

The reason why the property lawyer turns all these
rights and interests into things, however abstract they may
be, is that since they have value, people are willing to buy
them; and any valuable asset which is the object of commerce
is properly treated as a thing, just as much if it is an
abstraction such as a share in a company as if it is a physical
object such as a ship or a motor-car. The main reason why
far more attention is devoted to abstractions than to physical
objects is that, since they are creations of the human mind,
they can be made to conform to patterns consciously chosen
for their practical utility and capacity for combination with
each other. These patterns and combinations can be made
the objects of a calculus which is a fit subject of study by
lawyers. In comparison with them natural objects such as
land or animals are ¹¹⁹too individual to serve as mathematical
units of this kind.

Property as a socio-legal institution

Some would agree that the idea that the right exists absolutely
for the person entitled, is borne out by the institution of property - the

119. Lawson, F.H., Introduction to the Law of Property, Oxford 1958,
p. 16.



idea that the essence of property consists in the absolute control of the owner and that any restriction is an encroachment upon it. This is due to two reasons - the widespread uncertainty in both lay and legal thinking as to legitimate extensions and limitations of property rights; and the confusion between ownership and control. But no sounder and more dramatic evidence of the relation of ownership to the general limitations or restrictions can be found than in the planning laws of modern times. It is these limitations that represent most vividly the true and evident socio-legal structure of the institution of property. It is only by reference to such limitations that the general nature of property rather than the particular structural manifestations of property regulations, can be understood.

The basic idea that for the sake of the social order there must be some organised list of rights and of persons holding those rights belies the absolute nature of property. For rights in the absolute sense cannot exist without producing disorder and chaos in society. "A right is meaningless unless there are potential challengers to that right."¹²⁰ This point is recognised in the contemporary legal thinking in the assertion that legal or jural relations exist only between persons.¹²¹ In the words of Poole:

No right can, in a society governed by the rule of law, be absolute in the sense of being exercisable in total disregard of the right of others, since the very existence

120. Moore, W.E., "The Emergence of New Property Conceptions in America" J.L. Pol.S., 1943, p. 35.

121. Corbin, A.L., "Jural Relations and their Classification", 30 Y.L.J. 1921, p. 226.

of a legally recognised right depends upon its exercise being consistent with other such rights; if this were not so, the rights would negate each other.¹²²

Moore states:

Property right is never limitless. This is implied in the usual democratic formulations of the limits imposed by the "equally legitimate rights of others", but is actually inherent in the social character of the rights and the certainty that the free exercise of at least some of the differential powers conveyed by property rights would destroy the basis of social order ... No property system grants limitless and exclusive rights in valuable things, for to do so would be to destroy the very bases of the social order which property institutions serve to regulate.¹²³

Thus no right can be absolute in the individualistic sense, according to which the right is so sacred that it overrides all other claims even the right to life itself.¹²⁴ There is not a single right which a man can absolutely claim for himself. Even his own life is subject to social restrictions and society demands a purposeful use of it and its very existence is controlled by social and legal means.¹²⁵ "The idea of life implies that one has it. It is not if one renounces it."¹²⁶

Property is in essence the exclusive control of a thing. As a matter of fact, absolute control of property is non-existent. Seagle states:

In no legal system have rights of property been absolute.

122. Poole, E., English Property Law, London 1973, p. 5.

123. Moore, W.E., "The Emergence of New Property Conception in America", J.L.Pol.S., 1943, p. 36.

124. No one is ever allowed to use his property as to cause injury to others.

125. Abortion laws, Suicide laws, etc. illustrate this point.

126. Ihering, Law as a Means to an End, trans. Isaac Husik, N.Y. 1968, p. 406.

There are always the rights of escheat and eminent domain, and numerous restrictions on the use of property.¹²⁷

Similarly Ely states:

The right of property is an exclusive right, but it has never been an absolute right. In so far as the right of property existed it was an exclusive right, that is, it excluded others; but it was not a right without limitations or qualifications.¹²⁸

Ihering stated in most lucid words:

It is therefore not true that property involves in its "idea" the absolute power of disposition. Property in such a form cannot tolerate and never has tolerated. The "idea" of property cannot contain anything which is in contradiction with the "idea" of society.¹²⁹

He further adds:

The only reason that the demands of society are not so evident in property is the circumstance that the proprietor's own interest determines him as a rule to use his property in such a way as will further the interest of society along with his own.¹³⁰

Where the owner's interest clashes with the society, the latter predominates. The existence of a considerable degree of independence on the part of the owner to regulate and conduct his own property, leads to the mistaken idea of the absolute character of Property. The limitations on Property are social restrictions of inevitable necessity.

Property is a social institution. It springs out of the social conditions of man. Nevertheless, the institution of property is not consciously created from the first by sapient men in order to promote

127. Seagle, W., The History of Law, New York 1946, p. 51.

128. Ely, R.T., Property and Contract, London 1914, p. 136.

129. Ihering, Law as a Means to an End, p. 389.

130. Ibid, p. 386.

Cohen, R.C., Law and the Social Order, New York 1933, pp.57-61.

the ends of society. Nor, indeed, can the mere fiat of the lawgiver attended by all the array of his legal techniques call it into being or even largely promote its growth. In stating the conditions which shape property laws some thinkers lay stress on the economic aspect,¹³¹ others confine themselves to the legal aspect,¹³² and still others take as their theme instincts common to the whole animal creation.¹³³ Whatever be the conditions for stating the institution of property, it is clear that the institution has its basis in the great social structure. It is wrong to pin the institution of property to any one aspect of life.¹³⁴ It is not an individualistic institution because the term individualistic institution itself is a self-contradiction. It is thought of as an individualistic aspect of life for the reason already stated above. It is a case of mistaken identity. McDonald, referring to the social aspect of property, states:

The right of property is not a public function in the sense that the proprietor is merely a manager in the interest of society. Neither is there question of social versus individual rights. On the contrary ... it is mainly social considerations which entail the necessity of private appropriation and management of goods. The ever-present individual right and advantage must be made to harmonize with social interests.¹³⁵

131. Dixon, R.A., Economic Institutions and Cultural Change, London 1941, pp. 33-34.

132. Bentham, Theory of Legislation, London 1871, p. 113.

133. Beaglehole, E., Property, A Study in Social Psychology, London 1931.

134. In property it is not only the legal or the economic aspect that is always in question. The relation of property with such aspects as its working with social classes, political organisations, etc., are also called in question.

135. McDonald, W.J., The Social Value of Property according to St. Thomas Aquinas, Washington D.C., 1939, p. 15.

Individual rights without social reservations would negate each other. It is a term which must be considered in conjunction with, instead of in isolation from, its operative field. It follows immediately that no idea of property can ignore its social implications. It unfolds itself, not in mute compliance with any immanent and incessant dialectic but in accordance with the requirements and ideals of a changing social order.

The institution of property involves the whole range of aspirations of human life, the ethical, intellectual, and physical constitution of human nature. Any explanation which confines itself exclusively to any one aspect of the human situation will certainly be misleading. Here in the light of the above remarks I scrutinize the conception of property as depending on the legal, economic, and instinctive nature of man as a social being.

Property based on legal recognition

Let us consider Bentham's famous dictum:

Property and law are born together, and die together. Before laws were made there¹³⁶ was no property; take away laws, and property ceases.

Bentham insists that any thing to constitute property must be recognised by law.¹³⁷ Professor Geldart states:

Whether property as an institution could be conceived as existing at all apart from law is a question hardly worth considering at a time when the legal aspect bulks so largely

136. Bentham, Theory of Legislation, p. 113.

137. Ely, R.T., *op.cit.*, p. 133.

Amos, S., The Science of Law, p. 160.

Miller, W.G., Lectures on Philosophy of Law, p. 126.

as it does in modern civilization. Whatever else property is, it is a legal conception.¹³⁸

Similarly MacIver states:

Property rights are legal rights ... They exist only because government recognises and protects them. A particular government may do little more than uphold an already established system of rights, but in the longer perspective it is government that creates property.¹³⁹

In the context of these views we may agree that property can have no existence unless recognised by law. But equally evident and practical evidences have been found where property exists outside the ambit of the formal legal systems of states, before coming to be recognised by them. As in the case of Corporations in the United States, we find that corporations were found in states where there was no corporation Act. Walton Hamilton states:

Almost under our eyes a system of property is in the making. It emerges as all such usages do out of a series of expediencies. Claims are asserted without the law or even against its command. If for a time they endure without serious challenge, they come to be accepted by the parties immediately concerned and to be enforced by the group's discipline. In due course, through one device or another, they win the recognition of the state which puts its own police power behind them. The institution comes into being without the question of its establishment even being formally raised. The latest among such works of anonymous authorship is the pattern of property rights in the market.¹⁴⁰

Similarly Pollock cites instances where property existed prior to legal recognition. He states:

138. Geldart, "Some aspects of Law of Property in England", in Property, pp. 207-208.

139. MacIver, R.M. The Web of Government, New York 1947, p. 126.

140. Hamilton, W., "Property Rights in the Market", J.L.Pol.S., 1943, p. 10.

There may be "groups of advantages", to use Sir T.E. Holland's happy term, which have an appreciable value though the law does not recognise them. Imperfect rights of the nature of copyright, for example, might exist outside the law by usage and courtesy ... The goodwill of a business, again, would still have a commercial value if it were less efficiently protected by law than it is; and it would probably by no means lose the whole of its value even if it were not protected at all. The law began to protect it when it became notoriously valuable and not before.¹⁴¹

Property is, thus, not only a legal institution but a social institution as well. Law not only creates property but also recognises property already existing by courtesy and public opinion. Thus we can conclude that for the institution of property the existence of an organic society (in any form) is essential. Such a property may not be property under the statute law but it is 'property' by virtue of other immanent social norms which structure it as a social institution.

Social institutions are systems of relations which may be crystallised in various patterns depending on the overall cultural patterns and values of a particular society. They cannot be compressed into cut and dried definitions. It is the social needs which breathe essential life into legal institutions. To take one example of the institution of marriage, one finds social needs and attitudes affecting the legal notion of property, in a way that suits the external function of property to serve social purposes but contradicts the internal structure of property. In a family it is easy to decide who is the legal owner of family property - one who purchased the things. But every member of the family asserts, this is my bed, this is my radio, this is my pan in the kitchen,

141. Pollock, A first book of Jurisprudence, London 1929, p. 134.

this is my toy. So every one asserts his right to one thing or the other, though legally he may own nothing. Even a five year old child puts his claim to a toy. If such a family becomes disintegrated by divorce, the court of law finds it difficult to decide, if it is to apply the legal notion of property, who owns what. The adjudication in such a case is not a legal but a socio-legal adjudication. The official of the court who decides and attributes ownership goes into the social aspect of the understandings between the children and wife and husband rather than sticking to the notion of legal ownership.

Another typical instance of the institution of property which never occurred to the jurists nor has ever been brought to the courts for adjudication, but is often contested within society by a section of its people is that of beggar's corner.¹⁴² Beggars standing on street corners for begging sell their begging corners to other beggars. In case of dispute they apply their own rules and regulations to which the legal analysis of property is never applied, nor could it be thought essential to their profession. Beggars are invested with their corners, clip prices, continue a new craft. A novel article of property is thus formed out of social patterns to which legal mandates are entirely foreign. Such variables are of great importance to our understanding of the structure and function of the institution of property. But the legal notion of property fails to solve all these problems because there are forms of behaviour pattern of which the analytical and logical forms

142. Other such instances are when robbers and killers sell their victims to other members of their profession. They realise their sale price while the actual crime is committed by others.

cannot take account; then they must yield to social realities.¹⁴³ Though law takes account of both actual and potential purposes and motivation of human behaviour yet the distribution of human purposes and motives is too immense and full of contradictions for any legal concept to grasp it fully.

For the legal notion of property is not free from internal strains and even contradictions. Some 'thing' recognised as property for the purpose of one branch of law may be denied that character for the purposes of some other branch. Things may be assets for creditors in equity without being property for such legal purposes as taxation. Expectations for most purposes are not treated as property, yet some may be provable claims against a bankrupt. Under the Californian sales tax legislation, for example, a lease is not a sale and the lessor is exempt from the tax, but if a lease is for a considerable period (considerable period cannot be defined as it may differ under different conditions) it is regarded as sale (which is against the very structure of ownership - a lease of 200 years is a lease no matter how tenuous the right of the fee simple owner) and the lessor is subject to sales tax.¹⁴⁴ In fact, in social functions it is the legal title rather than the exclusive right of ownership which is considered the main attribute of ownership. For example, the long since repealed English Land Tax Act (1910) section 3, provides that an owner, in relation to land, includes every person who jointly or severally, whether at law or

143. Hargreaves, A.D., "Modern Real Property", 19 M.L.R., 1956, p. 17.

144. Keesling, F.M., "Conflicting Conceptions of Ownership in Taxation", 44 Cal.L.R., 1956, pp. 866-872.

in equity, is entitled to the profits of the land, etc. Similarly in High Way Act (1835), owner included a man in **occupation**, whether the actual owner or only the occupant tenant. These are the questions of social functioning of the analytical concept of property rather than of the concept itself. Economic, social and similar interests are likewise, from the legal point of view, alien ingredients. Thus the question of legal recognition or legal condition of ownership does not embrace the whole compass of social life.

Property based on economic conditions

Dixon regards the existence of economic surplus as a condition of ownership. He states:

Far back in the dim recesses of prehistory, when the individual was but an insignificant member of the hunting pack the products of his feeble efforts - the crude implements, the skins used as clothes, and the food gained in the hunt - were not property ... Property did not appear until a definite surplus over subsistence arose. The economic surplus was the phenomenon that gave rise ... to property. ¹⁴⁵

But here Dixon seems to confuse between the right of property and the object of property. The scarcity of goods or surplus of goods is the idea of wealth and not of ownership. Wealth is goods owned, but property is a right. If wealth increases or decreases, it does not affect property. For example, limitations on the right of property do not increase or decrease wealth. Property is a social institution which embraces the whole of human behaviour patterns. Its existence does not depend on economic scarcity or surplus. In a society where

145. Dixon, R.A., Economic Institutions and Cultural Change, London 1941, pp. 33-34.

there is abundance of every thing for everyone, no clash in fulfilling one's needs, the idea of ownership is still the basis of possession. Its recognition is socially demanded for peace and the welfare of society. For example, where everyone takes from the surplus for his needs, he feels and seeks security in the possession and use of his acquisition only if and only if his possession is accepted and respected by other members of his society. His right to his possession is respected only when the institution of ownership is recognised in such a society. Thus the institution of property is based not only on economic grounds but on all those social needs which are the basis of human life and existence.

As Amos states:

It is not material wants, hopes, desires, and tendencies alone to which ownership lends its aid as a potent instrument of satisfaction and even development. The moral aspirations and needs of individual man are scarcely less signally sustained and gratified by ownership than the material.¹⁴⁶

In any society, whether there is surplus or scarcity of goods, the institution of property depends on the recognition of the right of the individual to the exclusive disposition of some goods. Any interference with his property that he laboured to get out of available goods, whether abundant or in short supply, would be a negation of the right to participate in the surplus or scarcity of goods and therefore a threat to the peace and security of the society. The recognition of the general principles, establishing the exclusive use of an object, to which we call ownership is thus an inevitable necessity of social life. Property is

146. Amos, S., The Science of Law, London 1874, p. 155.

maintained and established as a social need for social purposes.

Instinctive basis of property

Most discussions of property, especially the idea that the institution of property is a universal institution, has led some to include in this study the behavioural aspects of animals as an evidence of the existence of the institution of property among animals common with human beings. This supposition of the universal character of the institution of property, that no one has ever lived in any society and under any circumstances so precariously that certain things necessary for his living are not indisputably regarded as his, has given rise to a widespread ascription of the phenomenon to an innate instinctive tendency of proprietorship. Letourneau¹⁴⁷ gives a psychological explanation in terms of animal propensities for food and dwelling and compares them with human action in primitive societies. He interprets this phenomenon as a direct result of a property instinct common to both man and animals. Similarly Beaglehole states that animals possess property no less than man. He offers a psychological explanation whereby he states that just as in the case of animals, for example, their dwelling is an organic part of their nature, similarly in the case of human beings "personal property is ... believed to be part of the self, somehow attached, assimilated to or set apart for the self".¹⁴⁸ A more recent approach to the subject is made by Ardrey.¹⁴⁹ His approach is

147. Letourneau, Property: its Origin and Development, London 1892, pp. 1-21.

148. Beaglehole, E., Property a Study in Social Psychology, p. 134.

149. Ardrey, R., The Territorial Imperative, London 1969.

comparable to that of earlier writers. The basis of property is not to be found in those drives and instinctive tendencies for food and dwelling, but in those behaviour patterns which establish the institution of property. As Leslie states:

Property has not its root in the love of possession. All living beings like and desire certain things, and if nature has armed them with any weapons are prone to use them in order to get and keep what they want. What requires explanation is not the want or desire of certain things on the part of individuals, but the fact that other individuals, with similar wants and desires, should leave them in undisturbed possession, or allot to them a share, of such things. It is the conduct of the community, not the inclination of individuals, that needs investigation. The mere desire for particular articles, so far from accounting for settled and peaceful ownership, tends in the opposite direction, namely, to conflict and the right of the strongest. No small amount of error in several departments of social philosophy, and especially in political economy, has arisen from reasoning from the desires of the individual, instead of from the history of the community.¹⁵⁰

The hypothesis advanced by Beaglehole and Ardrey to prove the instinctive theory of property offers very tenuous relationship between the phenomenon in animal and human groups. This is not to deny the role of instincts in the origins of the institution of property but what is contested is the foundations of property based on instinctive tendencies. This mistaken extension of the idea of property to animals fails on two grounds:

1) Animals are not conscious like human beings and do not form a system of behaviour patterns and institutional patterns that we could treat as the basis of any institution. Society exists only among human beings or sentient creatures. Animals merely form an aggregation. Animal behaviour

150. Introduction to Laveleye, E.D., Primitive Property, London 1878, p. xi.

is largely instinctive and thus fails to form behaviour patterns which form the basis of law.

2) By attributing property to animals all developments in the concept of property become obscure and inexplicable. For example, copy right, corporations and capital formations.

If one stresses the specific use of things by the possessor, whether in case of animals or human beings, the position that an inborn property instinct must exist will inevitably be congenial. But when certain specific use of a thing granted traditionally is withdrawn and a new usage recommended, the absence of traditional usage among animals will be an evidence of inflexibility of their behaviour. In this case, the universal character of property as being common not only to men but being shared by animals as well, will recede to the background. As far as the range of this phenomenon in human societies is concerned, this is so broad when contrasted with the restricted tendencies of animals that for purposes of constructing a theory of property or any other institution, the hypothesis advanced by Beaglehole and Ardrey is of negligible value.

In the light of the above discussion, it is difficult to refer to any point of time for the origin of ownership or to pinpoint a single source as a basis of ownership. Such diverse factors in the concept of property make it a problem not only for the lawyers but for all social disciplines. As Professor Hargreaves states:

The problem of ownership remains but it is not a legal problem; it is the concern of ... any and every specialist who can contribute his grain to the common heap ... The lawyer naturally has his contribution to make, but as the problem is not fundamentally a legal problem the final

solution does not lie with him. He is concerned with ownership only so far as it produces consequences within the sphere of his own special technique.¹⁵¹

The institution of property has grown and is growing within the fields, and not the fences, of various social disciplines. It cannot be put into a strait-jacket and confined within one discipline. The study of the institution of property is a social discipline and its legal aspect consists in recognition of the element of "exclusion".

The framework within which this "exclusion" operates is constituted by a normative order in terms of which the three key terms used - possession, ownership, and property - can now be explained to conclude the foregoing argument. The use stipulated for these terms is as under:

Possession signifies a state of facts in which a person or a group of persons exercise actual control over things. It is factual control over things. It is primarily of economic significance, in the sense that possession gives a person the opportunity to use a thing to meet his needs. The idea of control over things has grown up with this idea of personal use of things to fulfil individual needs.

Ownership signifies a normative order in which an individual as of right exercises exclusive control over something. Ownership has, as its necessary consequence, right-duty relations with respect to things, such as to protect the physical relation which an individual establishes with the object through possession. Ownership refers to a state of being an owner of something, that is, having a right to exclusive possession of it, together with other incidents which vary from system to system.

Again ownership signifies the legal (or other normative) institutions in the sense of institutive rules, consequential rules

151. Hargreaves, A.D., "Modern Real Property", M.L.R., 1956, p. 17.

and terminative rules¹⁵² in terms of which the right of exclusive possession and other incidents can be framed and ascribed to an individual or group of individuals.

The term property can be used in the following senses:

Someone can be said to have property or the right of property in something. This is the something as being an owner.

Property is also used in the institutional sense as in the phrase 'the institution of property'. In this sense it is identical with ownership in the institutional sense.

Further, 'property' may signify an object over which the right of property or ownership is exercised. Anything which under a given legal system can be owned is either an actual or a potential object of property or ownership.

The different conceptions of property that prevail in different legal systems can be explained in terms of types of things over which ownership can be exercised. Furthermore the different conceptions of property can be explained in terms of varying incidents that follow from the control of things. Thus the category of things and the nature of incidents that follow from the exclusive control of things are necessary to the understanding of any particular conception of property.

The ambiguities in usage of the term 'ownership' and 'property' can be clarified by expanding the terms. Thus to avoid ambiguity we may speak:

1) of the 'right of ownership' or 'right of property' as signifying the owner's normative position.

2) of the 'institution of ownership' or 'the institution of property' as signifying the normative order which makes it

152. MacCormick, D.N., op. cit., pp. 106-107.

possible to have the 'right' mentioned in (1),

3) of 'objects of property' as signifying
'property' in the third sense, property as something over
which 'the right of ownership' as defined by 'the institution'
can be exercised.

CHAPTER II

EARLY FORMS OF PROPERTY

The first chapter gave an abstract analysis of the concept of property, showing that it is a concept which presupposes a certain generic framework of norms concerning rights, privileges, powers, and immunities in relation to the use of 'things'. The essential or defining element was found in norms conferring rights to exclusive possession of things. From the point of view of that analysis, it is clear that there may be many variations in forms of property, because in different social and legal systems, the content of the property norms may vary very greatly. Different types of societies are characterised, among other things, by differing conceptions of property - differing conceptions as to the proper allocation of rights and powers etc. to property owners, and indeed as to the duties and responsibilities attaching to ownership. A highly differential feature of some societies (which will be considered in this chapter) is that the right to exclusive possession characteristic of ownership is a right enjoyed by members of a group against outsiders, not by members themselves; where this is the case, we may justifiably speak of a system of communal rather than individual ownership. What these very different conceptions have in common is that they are all manifestations of the same concept abstractly analysed in chapter one.

Abstract analysis is not, however, enough in itself for the understanding of such an institution as property. The norms which give the concept its meaning are legal and therefore social norms - norms established in a society whether by custom or by enactment. As social norms they must be understood

within the setting and context of the societies which gave them birth. In that sense and for that reason property must be understood not simply as a formal legal concept, but as a concrete social institution located within a system of legal-cum-social norms whose observation serves some function or functions within a society.

A principal objective of this thesis is to find the basis on which the institution of property is established. Again why should there be social allocation to individuals of rights in relation to things? The question almost answers itself. Human beings require access to the material things of the world around them in order to survive. In this sense, it is needs of individuals which are fundamental to the institution of property. A system of property must be such that it affords to all members of a society access to the means of subsistence. And this indeed the institution of property illustrates and unfolds in its long history through social turmoils and struggles, though with social developments and different social philosophies, the legal order, by means of a series of economic concepts, like contract, deviated from the path of serving needs of each individual to advancing those of a section of the society. But these changes no longer affect the basic idea of ownership as fulfilling needs of individuals. These developments have, however, taken the institution of property out of the social and economic connections as a part of human personality concerned with satisfaction of needs of each individual. Ownership as an exclusive control over external objects is the basis of economic activity in fulfilling needs of individuals. It is the process of economic utilisation of a thing that is important, and this utilisation involves possession, on which the institution of

property is based. Thus it is very clear that it is the utility of things (and the legal relations respecting the things are secondary) to fulfil needs of individuals which forms the basis of the institution of property. And a legal order ignoring the idea of fulfilling needs of each individual through the institution of property does not represent the true purpose of the institution of property as is found in the idea of possession as a basis of ownership. The doctrine of ownership as an unlimited control over things is a juristic fiction and is presented in modern times as if it constituted the entire contents of the concept of ownership.

The early forms of the institution of property, relating both to moveable and immoveable objects, show understanding of the necessity of external objects for the satisfaction of needs of individuals. In primitive times, one finds instances in the cultural and social way of living in which the use of things is related to the satisfaction of needs of all individuals. The collectivist instances in owning means of production corroborate the idea that no member of a group, or clan, or family may find himself destitute, without the means to satisfy his needs. (The very idea of external objects is imbued with the notion of their function to satisfy human needs.) And the collective mode of living and the collective use of things further suggests, first, either the scarcity of things, such that separate individuals cannot all secure sufficient for their needs, or second, (which is almost the same thing) the need of collective effort to produce enough for the living of each. This points to the fact that the use of things in their early forms is related to the satisfaction

of needs of each individual. And the idea of unlimited control over objects unrelated to needs of an individual has not yet been reached.

It has been objected that in fact property systems have often concentrated control over things in the hands of a relatively small section of a society, upon whom all the others become dependent. This is obviously true, in different ways, of both feudal and capitalist property systems. As against this it can be replied: that in fact these systems have had to develop subsidiary institutions who enable non-owners to have some however precarious access to the things they need for survival; but this is not the universal character of the institution of property. It is a superficial characteristic of the institution of property, a superficial property relation, which provides for the needs of individuals not through the institution of property but through other institutions. The legal form must exist in some form before it can be increased in scope. Development of the institution of property into a means of wealth for a few individuals is the development of the legal form, totally lacking the substance from which it arises. This is how one finds absurdities in private property in modern times. The private property as we will see further is produced not by the norms of the institution of property but by private forces in the shape of appropriation by one person of the labour of others embodied in the labour product. It has its roots in the public force as well in the shape of laws protecting such appropriation and converting labour power into a market commodity.

This latter argument is dependent on a historical view

of the evolution of forms and conceptions of property. In its earliest origin property served the function of securing to all means sufficient to meet their needs. Hereinafter this will be called 'the economic function of property'. If developments arising from these earlier forms have diverted it partly from that economic function, that is not necessarily to be accepted as a satisfactory development, although this thesis must trace how it happened.

The object of this chapter is, then, to examine so far as possible the earlier forms of property of which we have any evidence, with a view to sustaining the theory sketched above. Since there is not enough direct evidence, one has to rely on indirect evidences afforded by custom, usage, etc. As Maine says:

We take a number of contemporary facts, ideas, and customs, and we infer the past form of those facts, ideas, and customs not only from historical records of that past form, but from examples of it which have not yet died out of the world, and are still to be found in it ... Direct observation comes thus to the aid of historical enquiry, and historical enquiry to the help of direct observation.¹

Discussions of collective living and collective use of things in various societies in different regions of the world gives the view that the notion of control of things is associated with the function of fulfilling needs of individuals in all social systems; and also that all societies have passed through more or less similar stages of social development. Modern researches have reached the conclusion of relativity of culturally constituted values and have shown the immense variability to be found in the specific cultural forms of different human societies. At the same time, however, it has become

1. Maine, H. S., Village Communities in the East and West, London 1881, pp. 6-7.

increasingly apparent that there are some basic similarities in human culture the world over. Sir Henry Maine illustrates this point by tracing the concept of village communities the world over.² Village communities such as existed in Russia have also been found existing among nations most distinct from one another - in Germany and ancient Italy, in Peru and China, in Mexico and India, among the Scandinavians and Arabs with precisely similar characteristics. When an institution is found among all nations of the world, we can see in it a necessary phase of social development and a kind of formal law³ presiding over the evolution of forms of social and legal institutions.

Property in Moveable Things:

The earliest idea of property far back in the dim recesses of history was intimately associated with the procurement

2. Maine, Gomme, Laveleye, Letourneau, etc. believe that village communities are as old as human race itself. They take it as the basis of the institution of property. Seebohm, however, expresses the view that village communities have arisen from the influence of civilisation. Lewinski says that they are formed with the increase of population.

3. In introduction to Laveleye, Primitive Property, London 1878, p. xvi.

Westermarck, E., The Origin and Development of the Moral Ideas, London 1908, vol. ii, p. 1.

Hallowell, A.I., "The Nature and Function of Property as a Social Institution", J. L. Pol. S., 1943, p. 116.

of subsistence. Primitive man was satisfied by what he got to eat. The bushman has no house and lays nothing for the future. All his efforts and use of tools to procure subsistence were his communal efforts as a member of the group. But he was not like one of the syphonophorae. The products of his hunt are his, although distributed among all the members of his group so that no member shall die of starvation. It is not difficult for one to deduce the communal principles from such a situation but the keen sense of possession developed with more foresight and insight into situations, the idea of property from this mere speck advanced, though it is right to argue that this definite idea of property has not taken root until foresight begins. But it is wrong to say that such important, though meagre, belongings of bushmen were not his private property.⁴ As Professor Amos states:

The fact or institution of ownership is such an indispensable condition of any material or social progress that, even throughout the period during which the attention of law is concentrated upon family

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4. One of the chief difficulties in the study of history is the tendency to judge early institutions by the standard of our own. This tendency is indefinitely strengthened if we use the same name for both the ancient and the modern institutions. Thus lack of terminology is one of the grounds of confusion. The purchase of a wife in primitive times is always compared with modern commercial transactions which ignore the non-commercial spirit of the primitive people. As Firth says:

Such exchange has primarily a social meaning and not an economic meaning. Again economic values do not stand isolated in their own field, but are closely interwoven with the whole texture of society.

Firth, R., Primitive Polynesian Economy, London 1939, p. 9.

Gluckman, M., Politics, Law and Ritual in Tribal Society, Oxford 1965, pp. 42 & 47.

Diamond, A.S., Primitive Law Past and Present, London 1971, p. 190.

and village ownership, the ownership, on the part of individual persons, of those things which are needed for the sustenance of physical life, becomes increasingly recognised as a possibility or necessity.⁵

Similarly Hobhouse states:

Among primitive peoples there is comparatively little scope for the institution of private property. ... such peoples possess little which can be appropriated, except their small personal belongings. These, it would seem, belong to the individual from the first.⁶

Mankind may be traced by a chain of necessary inferences back to a time, when, ignorant of fire, without artificial weapons, they depend like the wild animals upon the spontaneous fruits of the earth. The objects of ownership would naturally increase with the multiplication of those arts upon which the means of subsistence depends. The earliest tools of production namely rude weapons, stones, bones, etc. were the chief items of property. A passion for their possession had scarcely been formed in their minds. The idea concerning their value, their desirability and their inheritance was feeble. It is not an illustration of sophistication but of primitive simplicity. The view that ownership is an outgrowth of customary appropriation of such things as rude weapons, utensils, etc. by individuals is well supported by the usage of all known primitive tribes.⁷ In all

5. Amos, S., The Science of Law, London 1874, p. 151.

6. Hobhouse, L.T., Morals in Evolution A Study in Comparative Ethics, London 1951, p. 318.

7. The owner's weapons and other personal effects were buried in his grave. Fustel, however, gives a religious explanation for this usage along with the idea of personal property.

Fustel De Coulanges, The Ancient City, London 1916, pp. 17-18.

Diamond, op. cit., p. 190.

communities the individual members exercise a more or less unrestrained right of use and abuse over their weapons. To a modern man this would count as property.⁸ But to a primitive man whose usages and organisations are under review, he would look upon this relation as property. This habit of looking at his personal effects to have more intimate relation with the personality of the possessor is more unbroken in a primitive man than in civilised man.⁹ But for this there can be many explanations and the religious and superstitious¹⁰ nature of man, especially in primitive days, is regarded as the main factor for explaining such tendencies. Seagle states that

it is true to say that the savage has a more jealous regard for objects of personal use than a civilised child has for its toys.¹¹

8. Ownership in the modern legal and economic sense has not yet developed. The concrete facts and conditions of use was the notion accepted by the primitive society in case of personal chattels. As Diamond states:

the right to possession of more things than can be used is often not recognised.

Diamond, op. cit., p. 188.

9. In modern times in the case of corporate ownership the idea of personal control is altogether negatived.
10. Both Fustel and Hobhouse give religious explanations for this intimate relation between man and his personal belongings. Beaglehole, however, traces this relation to the instinctive nature of man common with animals and tries to prove that animals have as much sense of property as human beings. This view of Beaglehole has already discussed in Chapter 1, pp. 55 & 63.
11. Seagle, W., The History of Law, New York 1946, p. 51.

This point of view in large measure shapes and colours the early institution of property. Veblen compares this sense of intimate relation with ownership and states:

Under the guidance of this habit of thought, the relation of any individual to his personal effects is conceived to be of a more intimate kind than that of ownership simply. Ownership is too external and colourless a term to describe the fact.¹²

Thus such meagre belongings of the primitive people as would under the nomenclature of a later day be classed as private property are not thought by him as his property at all, they pertain to his self. Diamond expresses the opinion that primitive law has no such conception "of 'ownership' in a modern technical sense ... It is better to speak of a thing as 'belonging' to someone, or being 'his' rather than as 'owned' by him."¹³ Thus the idea of property in primitive times is rudimentary indeed. But if it be called property at all, it

12. Veblen, T., "The Beginning of Ownership", *The American Journal of Sociology*, November 1898, p. 355.

Thurnwald, R., Economics in Primitive Communities, London 1932, p. 186.

Lafargue, P., The Evolution of Property, London 1894, pp. 16-17.

Seagle, W., op. cit., p. 260.

13. Diamond, op. cit., pp. 188-189.

is individual property. The earliest idea of property thus was of chattels.¹⁴ This was the first main avenue leading towards individualisation of property. Such objects as weapons, tools, wearing apparels, etc. reflect both their economic function and their relation to the personality of the 'owner' because of the superstitious beliefs and customs of the possessor. The articles of purely personal use to some extent and in limited numbers were thus allowed to the individual.¹⁵ Such objects increased in number with the progress of skill and became more and more secularised and began to be used as objects of commerce.

The exclusive use of things allowed to an individual for however a short period and however limited a category of things, is ownership. Though at this primitive stage the idea of such use of things was closely associated with an individual's own personality, the things were truly considered a part of his personality, yet because of this closer association which we do not find in modern times, as in the case for example of shares in a fund, we will be wrong if we deny that this stage of human development has a form of ownership. Moreover true to the convictions of a modern man, the peculiar character of ownership referred above, is more apparent than real. In our own society the ordinary commercial principles are supplemented by transactions based upon kinship sentiments. In a civilised

14. Goldenweiser, A.A., Early Civilization, An Introduction to Anthropology, London 1921, p. 137.

15. Diamond, op. cit., p. 188.

society the rational motives are merely more overt.¹⁶

Every society has its own norms and it is wrong to think that jural postulates belong only at a particular stage of society. The Indians living on the prairies had their own social order. It is possible under their system, social or legal, that such associations are considered vital to be an owner. Thus, however, rudimentary or tenuous the idea of ownership may be, it is wrong to think that there was no ownership among these primitive people at any stage of development.¹⁷ Failure to recognise the fact that in the course of its development every society has devised a special mould in which to cast its traditions of ownership, is one of the primary reasons for all these misunderstandings of the nature and significance of the primitive idea of property. Understanding of the social matrix has remained the chief point of writers of legal history.¹⁸ Firth keeping this very cautiously in view as an important factor in understanding the primitive institution of property states:

It must be realised in considering the problem of the control of man over material goods that such terms as 'property' and 'ownership', which are employed to indicate a certain set of relationships in

16. Firth, R., op. cit., p. 5.

Gluckman, op. cit., p. 45.

17. Dr. Malinowski goes so far as to regard it a grave error to use the word ownership with a definite connotation given to it in our own society. Because the meaning we attach to it is linked with highly developed economic and legal conditions. He infers that, therefore the term own, as we use it is meaningless when applied to a native society.

Diamond, op. cit., pp. 188-189.

18. Hobhouse, T.L., "The Historical Evolution of Property, in Fact and in Idea", pp. 3-5, in 1913 edition, Property.

our own society, do not necessarily preserve the same connotation when applied to a native community. The essential factors in the situation - the individual, the goods, and the other members of the community - remain unchanged, but the set of concepts by which these are related has been formed against a different cultural background. Hence the impression that is conveyed ... that an object is 'owned' by a certain person may be entirely divorced from reality through ... ignorance of all those rights and qualifications which to the native form an integral part of the situation.¹⁹

What I want to stress here, as a conclusion from the discussion above, is that the use of things or the control of things for personal use became the basis of the institution of property in moveable things. The notion of possession as a purely economic relation became the basis of ownership. Here one finds the function of exclusive control over things as basic to the satisfaction of needs of individuals. This preliminary stage of the institution of property one might call pre-property. But whatever be the developments of the institution of property from pre-property, the basic idea of ownership, which has its basis in possession, will always stay in the satisfaction of needs of individuals. Thus property grew up in law to meet economic needs of each individual.

Property in Immoveable Things:

The idea developed in relation to moveable things, that property is born out of individual's personal use of

19. Firth, R., Primitive Economics of the New Zealand Maori, New York 1929, pp. 330-331.

things to satisfy his needs, is even more evident in the case of property in immoveable things. The satisfaction of needs of individuals, at all times, is connected with the means of production. To deprive a man of the means of production by means of which he has to produce products for his living, is tantamount to depriving him of his life. In primitive times the appropriation and maintenance of property, necessary to satisfy needs of each individual, took the shape of communal property so that none is deprived of the means of subsistence. The right to use as a consequence of ownership is conditional on no one using more than he needs. The conception of ownership is functional, the function of fulfilling needs of each individual.

In the case of immoveable property one finds the existence of individual property co-existent with the communal property which is in the form of a social trust, for the use of all. One's right to collect wood does not conflict with the other's right to collect berries from the same piece of common property as per their needs. Thus the legitimate expectation of each is co-existent with that of others. And in the case where each one's claim conflicts with the others (as each wants to collect wood,) their claims will be met by sharing, as we find that in some societies all do the cultivation and the produce is shared by all. In cases where one does not use the thing, as in the case of canoe or land in Melanesian culture,²⁰

20. Rivers, W.H.R., Social Organisation, London 1924, pp. 106-107.
 Firth, R., Primitive Polynesian Economy, London 1939, pp. 243-252, pp. 264-278.
 Gluckman, M., op. cit., pp. 36 & 54.

others are free to use this without anyone's permission, if it is lying idle. The purpose behind such an idea lies in the use value of an object, and is based on an assumption that its use by others is to satisfy their needs and things have a purpose to fulfil which is proper to their nature. Thus so long as one is using a thing, his ownership is exclusive but his exclusive control is not unlimited in the sense that he has it even when he does not personally use it. The exclusive control which implies the control of a thing to satisfy his needs is not inconsistent with possession of a thing, but is inconsistent when possession, that is economic order, does not conform to the economic order of the thing. By 'economic order' I mean an ideal state of affairs in which each individual possesses for use only what he needs, and needs for his use all that he possess. Things are to satisfy needs of individuals and in this lies their economic order. But when things do not conform to this economic order of satisfaction of needs of each individual who has possession of things, the possession of a thing becomes inconsistent with their economic order. For example, when a man has the possession of a thing but is barred from the use of it or he has not the use of it for himself, his possession is inconsistent with the economic order of the thing. The order of ownership to conform to the economic order of things is to be embodied in possession. This basic idea of the institution of property is found in the origin of ownership. Economic systems organise human efforts to transform natural resources to useable goods and the legal order has to watch and protect that these goods are distributed to meet needs of each individual who created

them and for whom they are created. The institution of ownership was founded on this basic idea. And it is clear from the foregoing discussion relating to the existence of property in land (or in means of production) in various societies.

In primitive times relative equality of conditions led to the relative equality of collective unity, an imperative necessity. Human beings must exist in societies in order to survive. All members of a clan lived near the subsistence level and social classes or hierarchical differentiations, were absent. Equal liberty was the result of relative equality of conditions because when aided and unvaried by external powers men are nearly equal. Whatever be the differentiations which existed as a result of the division of labour, they were purely functional in the earliest societies. It is around these communes that the whole concept of property evolved. The communal disposition of the means of consumption first formed the basis of primitive institutions more fundamentally than even the utilisation of the means of production. The whale cast on the shore by the sea was shared by the whole clan. A successful hunter must share the spoil. The rules of distribution were varied and numerous. Under the primitive culture the means of subsistence are habitually consumed in common by the group and the manner in which such goods are consumed is fixed by the custom and usage of the place. Such practices and usages are not easily broken and with the passage of time they become a part of the habit of life. They survive as habits rather than creeds. This practice at the same time was essential to the survival of the group. Such practices also suggest an idea that the deputing of certain

persons for hunting is merely the division of labour.

Similarly other work was assigned to other members of the group. The labour of each was shared by others. Thus the idea of ownership of land does not arise except in the right to gather its produce for consumption. The idea of private property lies not only in holding the object of property, but having an exclusive use of it. But if one 'holds' that which every one is free to use, property evaporates. Thus an important question as to the existence of private property turns out as Seagle states:

If a cultivator shares with other members of the community, he may be said to hold the land for the benefit of all. The important question is not who occupies the soil but what is done with the fruits of the soil.²¹

There is no question of individual right or ownership. The question of ownership is not brought up by the fact that an article has been produced or is at hand in finished form for consumption. It is the whole group that consumes the article no matter who produced it. Plato's ideal that friends have things in common was the accepted standard. The clan disposes itself on the land not with reference to ownership, but with regard to kinship. Even where the claim to hunt in a particular place was recognised, there was really involved no more than a division of labour. Its stay in one place gives the idea of spatial consciousness, that is, territorial claim, not the idea of property. The relation between the community and the soil, among these nomads is, as the German jurist Gierke points out, rather similar to the international rights which a state has to its territory and to the right

21. Seagle, W., The History of Law, New York 1946, p. 56.

Gluckman, M., *op. cit.*, p. 52.

it has over a domain. The soil was sub-divided only for the purpose of cultivation by its members. It is the work rather than the soil that is allotted.

The most important question of property concerns what in modern times is known the ownership of the means of production. In primitive times when either there was no tillage or the tillage was very simple and just sufficient for subsistence, it was the chief and most valuable means of production. It was held under communal ownership, since groups were having collective means of subsistence. It is the collective utilisation of land that proves the collectivism of primitive societies. As collective labour was the only possible form of labour to satisfy human needs; this dominant form of utilisation of land ruled the relationship of production. Among hunters and food-gatherers, who are the simplest of the primitive peoples, private property in land is entirely unknown. The benefit of the entire community either in the form of a clan or family is the goal. The land is desired only because of the valuable products it yields.²² Sumner²³

22. The primitive people, Sumner states, do not understand true ownership of the soil. The land has for them no more value than the air or the sea for us. This common property which the horde is supposed to have in relation to the land occupied or rather settled by its members, is in reality not property but simply a common use of the soil. Nevertheless this same vague form was the one out of which the more specific types developed and, whatever it may be called, it is with this un-individual appropriation of land that the evolution of property in it begins.

Sumner, W.G., The Science of Society, vol. i, London 1927, pp. 282-291.

Diamond, op. cit., pp. 189-190.

23. Sumner, op. cit., pp. 283 & 287.

remarks that to the hunter land laws are really game laws.

Because of the different characteristics between moveable and immoveable property, the idea of individual ownership in land was unknown to primitive peoples. Moveables could be carried, held, and concealed but since land lacked these characteristics, they could not have conceived it to be an object of property. Land was available for use but not for individual possession. The Akikuyu tribe²⁴ in Africa found it difficult to reconcile the idea of sale with their idea of land. The idea of sale of land was so foreign to them that they could hardly conceive what is meant when the idea of sale was opened to them. The idea of possession of land found its way among primitive people only when the idea emerged of a settled life in a fixed location. One must not think that primitive people made a clear distinction between moveable and immoveable; they simply did not have the idea of immoveable and immoveable belonged to the period when civilisation started taking birth.

So long as man lived by chase and the fruits of the earth, he had no cause to think of appropriating land. But as tillage developed and the cultivated land acquired importance, it brought settled life in the community.²⁵ Nevertheless, individual appropriation of land was not thought of until dwellings and crops had become permanent. Hunting grounds were held in common by the tribes and no exclusive claim was made by individual members. But the hunting ground was claimed by the whole tribe

24. Rivers, op. cit., pp. 109-110.

25. Forde, C.D., Habitat, Economy and Society, London 1957, pp. 378-379.

as their exclusive property as against any outsiders.²⁶ Thus it must not be supposed as no man's land. This is true tribal property and is by no means an infrequent institution. Intruders were fully punished by the tribe. This is clearly nothing like individual ownership.²⁷ Darwin found communal ownership over hunting grounds.²⁸ In Australia each individual was possessed of a right to hunt within the group territory.²⁹ Exclusive control in the sense of unlimited control was not thought necessary for ownership. But exclusive control was the right of the individual to own what he acquired for his subsistence from the common property in which the exclusive right of each was co-existent. The individual ownership was linked to the ownership of the group, because the idea of ownership was linked with the idea of property for the fulfilment of needs of each individual. It was assumed that if one was no longer using the thing for the purpose of fulfilling his needs, it was available for use to others.

The tribes who succeeded in taming large animals and learnt the art of agriculture were fortunate in their possession of animals and more or less settled life. The quantity of food produced on the same space being larger, the social groups became more numerous. A Masai shared pasturage with all the other inhabitants of his district and when the grass was exhausted there

26. Ibid. p. 375.

27. Letourneau, Property, Its Origin and Development, London 1892, p. 24.

Lewinski states:

It is quite erroneous to speak of common property. It is only by confusing the existence of boundaries with the idea of property that this mistake is possible.

Lewinski, The Origin of Property, London 1913, p. 7.

28. Letourneau, op. cit., p. 25.

29. Ibid. p. 18.

was a general exodus.³⁰ The Kafirs had no property in land, but shared common pasturage.³¹ Similarly Hottentots practised tribal communism with regard to grazing land.³² Throughout Africa were found the survivals of old communal clan life.³³ Primitive communalism was general; there was frequently complete or nearly complete communalism. The Eskimo clan owned its ice pack. The Iroquois lived in long houses, so the Redskin of Mexico and Dyaks of Borneo. In such communalist dwellings the provisions were common.

In cultural sequence, the tenure of property becomes a tenure by prowess. The habit of letting a strong man alone in his possession easily develops. The recourse to might as a definitive basis of property becomes more immediate and habitual. There are always conventions, a certain understanding as to what are the legitimate conditions and circumstances which become the facts of habitual acceptance. Seizure and forcible retention very shortly gain the legitimation of usage. "The property the most lawful in the eyes of our ancestors," said Gaius, "was that which they had acquired in war."³⁴ "The art of war," said Aristotle, "is in a way, by nature the art of gaining property."³⁵ Thus ownership in land becomes approximate to the already well developed forms of property in weapons, and other chattels. Although in

30. Lowie, R.H., *Primitive Property*, London 1953, p. 205.

31. Letourneau, *op. cit.*, p. 88.

32. Lowie, *op. cit.*, p. 205.

33. Lafargue, P., *The Evolution of Property*, London 1894, p. 19.

34. Gaius 4.16.

35. Aristotle, *Politics*, 1.8.

origin the chiefs of the clans had the role only of commanding the people of the clan, and this position vis a vis the clan was that of reciprocal obligations, primarily of a ritual order, this new tendency turned their position into that of the chief of the land. Land came to belong not to the community but to the chief. Veblen³⁶ describes this situation as a division of population into two economic classes, one engaged in industrial employment and the other engaged in non-industrial employment such as war.

With this change in life-style the objects of property also changed from rudimentary objects to more valuable objects such as cattle and slaves. With this high valuation of things, private property increased its scope. Such a development is found among many savage tribes. Among the Hottentots cattle is the main moveable property and can be easily concentrated in a few hands, and thus becomes a source of future prosperity for them. There are thus both rich and poor in their tribes. The existence and division of tribes into two economic classes led not to the disappearance but to the deterioration of common property and laid the basis and origin of separate property. "Kinsfolk willingly exchanged a girl for an ox or a cow. Wealthy Hottentots were even prudent enough to buy little girls of six or seven, in readiness to replace their wives on active service, and thus a source of wealth."³⁷ These symbols acquired economic aspects similar to the character of money. This, however, presupposes a certain individualisation of property. The status of women was

36. Veblen, T., "The Beginning of Ownership," *The American Journal of Sociology*, 1898, p. 361.

37. Letourneau, op. cit., pp. 79-80.

thus equal to chattels. This is an example of an idea of private property at an early stage of human development. The rudimentary stages of private property followed the primitive communalism and preceded patriarchal property. Second, the system of exchange, the basis of private property (capital development), was developed.

These circumstances act as selective process which pushes a few individuals into the leading positions. This gave rise to aristocracy among the Kafirs.³⁸ The society on the Gaboon has all its aristocratic accumulations and its social elect, which lives nobly, does nothing, and is well fed. Among the American Indians may be seen a similar transition. " Thus king Kamrasi ... unhesitatingly took the goods of any subject to bestow them on his favourites."³⁹ Those closest to the supreme head became nobles. Similarly the king of Bantam ... " when a man dies appropriated not only his fortune, but his wife and children whom he reduced to slavery."⁴⁰ There was no other road to property than appropriating to one's own use the value produced by the exertions of others. But this practice of accumulating goods by the individual could not have come into vogue to the extent of establishing a new institution without the disintegration of the old communistic habit of communes, and the usurpation of obligatory authority by the chief of the clan. In fact one must suppose the chief's power to have varied from that of a representative figure-head to that of an administrator with restricted powers. This

38. Ibid. p. 88.

Gluckman, M., op. cit., pp. 37-38.

39. Letourneau, op. cit., p. 93.

40. Ibid. p. 111.

appropriation implies that individual property in chattels was fully established because communal property cannot be the subject of appropriation.

In the pastoral stage a fortunate individual may accumulate flocks and herds, while other members of the group are impoverished through drought or pest. Under the pastoral system the notion of property in the soil begins to spring up. A tribe or clan settled at one place, though for a short duration, began to feel the identity of the place. But the idea that a single individual could claim a portion of the soil as exclusively his own never occurred to anyone. The reason may be that the idea of collective living during the previous stages was so effective that common hunting grounds were converted into common cultivation.

Gradually a portion of the soil was put under cultivation and an agricultural system was established. The territory which the tribe occupied remained its undivided property.⁴¹ Ownership was always in some kindred group rather than in individuals; spoken of as the property of various clans. The Aztecs of Mexico had held land in common. Among the Iroquois, the land was the property of the tribe. Rivers's account of the people of the Island of Ambrim indicates that the nature of ownership of land was collective and states:

A man might clear a piece of ground entirely by his own labour, and might plant and tend it without help from anyone, but any member of his *vantinbul* could nevertheless help himself to any of its produce

41. Lafargue, P., The Evolution of Property, London 1894, p. 49.

without asking leave or informing the cultivator.⁴²

The size of the group and its nature may vary. It may or may not be a closely related body of blood relationship. But this was collectivism on a more permanent and settled basis quite unlike the modern corporation. All members of the tribe exercise identical rights upon land. It can be assumed and suggested as the first historical form of land ownership. The soil remained a collective property of the clan with a temporary right of occupation.⁴³

Agriculture being in the rudimentary stage, modern techniques for development of production not being known, the re-allotment of pieces of land to the groups remained a constant practice.⁴⁴ The land tilled once was to lie fallow the following year because its fertility deteriorated. But the fact to be noted which is important from our legal point of view is that it gives the idea that property in the modern technical sense was not yet developed. As Pollock and Maitland⁴⁵ state that in co-ownership, the land is owned by individuals, their possession is certainly not the same sort of individual ownership as that which is not in co-ownership.

Fustel takes the view that " since villages are small and it is only in small groups property was held in common, it

42. Rivers, op. cit., p. 106.

43. Lafargue, op. cit., p. 55

44. Ibid. p. 51.

45. Pollock and Maitland, History of the English Law, Cambridge 1898, vol. ii, p. 243.

does not **show** that all land was common.⁴⁶ If only land in the village was common, land outside the village like forests, meadows, and pasture land would render all subsequent evolution in the landed property unintelligible.⁴⁷ Second, because population was in general less than at the present day, it was not uncommon for the village to be small. In some cases the settlement might consist of one family with all agnates and cognates, including strangers in the family.⁴⁸ In such a case the land owning corporation and the commune coincide and there was accordingly collectivism within the settlement of the village. The same is shown by some investigations among such people as the North-eastern Algonkian Indians and the Veddas of Ceylon. Among the veddas each little group has his own ground, and within it each individual has been given an individual share as his own which is his for life and descends to his heirs. It can be alienated with the consent of the whole group. Again, alienation was based on the ground of similar needs of others and it was not alienation in the modern sense of lease or mortgage. Alienation for the fulfilment of needs consists in returning property to a condition where it again become available for others. It was put at the disposal of the community whereby it can be effectively used by others. Thus what we call collective ownership is still a dominant fact but still with certain reservations and qualifications private property is recognised.

46. Fustel, The Origin of Property in Land, London 1891, p. 122.

47. If all property is the result of labour, then property in the forests, meadows, etc. to which individual has not done any labour will remain outside individual ownership. This would leave the ownership of these unexplained.

48. Lowie, Primitive Society, London 1953, p. 196.

In javanese Dessa private property co-exists along with collective property, it is represented by family dwellings with its surrounding orchards.⁴⁹ Certainly collectivism need not be universal. But even where tribal communism did not prevail, there is at least some form of collective control on individual property, on its use and alienation. There is at least some form of collective ownership in the form of a small group such as the family. Even in the case of collective ownership within such small groups there remain traces of a collective ownership of larger groups. As Rivers conclude:

Behind the definite regulations concerning ownership by these smaller groups there is often the tradition of ownership by the clan, and it seems probable that there was at one time common ownership by the clan or moiety which has been replaced, at any rate in practice, by ownership in which the common rights rest on kinship.⁵⁰

It is admitted by the individual theorists like Fustel that individual property in the Roman sense of dominium was not in existence in primitive times. So even if there are some scattered evidences of individual ownership existing, it does not upset the widely found evidence of collective holding. At the most it can be argued that collective property in land was the rule, but particular instances of individual ownership did exist. Thus both collective property and individual property in some form can co-exist. Thus we can argue with Fustel⁵¹ that family ownership is not agrarian communism, yet it is certainly more like it than like private property. For example, under the Hindu coparcenary

49. Letourneau, op. cit., p. 117.

50. Rivers, op. cit., p. 114.

51. Fustel, The Origin of Property in Land, London 1891, p. 122.

system the chief or the head is merely the administrator of the family property, but not the owner of it. He probably only acts in this respect as the representative of the members of the coparcenary.

The theory that private property in land is preceded by a system of cultivation in common does not confine itself to the idea that there is no such thing as private property in land among mankind when in a primitive stage. Some argue that the law of property does not correspond to any branch of primitive law, indeed, the whole outlook of one who attempts to set forth the primitive law of property is necessarily the outlook of mature law.⁵² There was no concept of property in the primitive stage when people were living in communes. The idea of communal ownership is of late growth and is an extension of the idea of individual ownership. Communal ownership is a quasi-ownership, and is, therefore, a derivative concept. It cannot have preceded the concept of individual ownership of which it is a counterfeit. So these theorists argue that as regards this common stock no concept of property either communal or individual, applies in the primitive community.⁵³ It is obvious that when men were still in the hunting and pastoral stage, it had not yet occurred them to take for each a share of the land. When a system of cultivation occurred to them, they still continue to till the soil in common. But one thing of which these people were very careful was to protect their common possession of land from intrusion by outsiders,

52. Diamond, op. cit., pp. 188-189.

53. Malinowski, B., Crime and Custom in Savage Society, London 1926, pp. 17-21.

which gave them some sense of property. It never occurred to these men who ploughed, sowed, reaped, and planted to appropriate to themselves the soil upon which they worked. They took the soil as belonging to the whole community. So the theorists⁵⁴ who speak of private property in land as preceding communal property are applying the Aristotalian metaphysics that the general resides in the particular.⁵⁵ Under the guise of metaphysics they ignore social and cultural realities of primitive people. Second, they confuse the modern concept of property with the primitive concept. Some even go to the length for proving their individualistic concept that this communal arrangement is to be interpreted in the same light as a system of controlled and communal living during war.⁵⁶ They confuse the special conditions during war with the normal way of life of the primitive people. The primitive way of communal living is a state of permanent emergency. It is this state of permanent emergency that may be considered the possible proof that in actual living conditions in primitive times communal ownership precedes private property. Some even go to the extent of proving that private property precedes communal property by discovering the existence of property outside human species as among the ants, in that an ant hoards provisions and stores them in his particular space. But if we

54. Lowie, R.H., Primitive Society, London 1953, p. 222.

55. These theorists argue that private property is the general notion and communal property is the special type of ownership. Thus private property precedes communal property.

56. Lowie, op. cit., p. 207.

accept the explanation, future developments of property such as capital gain from capital hoards would be unintelligible since the ant does not make profit out of his or her hoard. It was the people that at first were the sole owner of the entire territory either cultivating it in common or making a fresh division of it every year. It was only later that the right of property, which was at first attached to the whole community, came to be associated with the tribe, family, and the individual. All land in the beginning was common land, say Maurer and Violetta etc. Maine expresses this common sentiment that in primitive society " the life of each citizen is not regarded as limited by birth and death; it is but a continuation of the existence of his forefathers, and it will be prolonged in the existence of his descendants."⁵⁷ In such a society the separate existence of the individual and thus of individual rights is not possible. The rights of independent existence and of separate property are a much later development. These developments are the results, not of family regulations at home, but of the extensions of the authorities established to settle the frictions within the group, and thus extension of the civil laws. As Maine states:

The agents of legal change, Fiction, Equity, and Legislation, are brought in turn to bear on the primeval institutions, and at every point of the progress, a greater number of personal rights and a larger amount of property are removed from the domestic forum to the cognizance of the public tribunals.⁵⁸

57. Maine, Ancient Law, London 1880, p. 258.

58. Ibid. p. 167.

Movement towards Disintegration of Common Property
and the Rise of Private Property:

Despite the fact that the institution of property in all these primitive forms of life was associated with the economic needs of individuals through their communal way of living, tendencies appeared whereby the individual desire for independence and private control developed. The communal way of living took different ways to meet the economic needs of individuals - but one thing that remained common in all these communal ways of living was the overall supremacy of the clan or group or family over the means of production in their distribution to their members and strict supervision through their customs over the members of the group against introduction of outsiders or making any alienation in opposition to the group's over all control of the means of production.

It is this feature of exclusion of outsiders which justifies us in speaking of systems of 'communal property'. As we saw earlier the right to possess exclusively of others is the essential feature of 'ownership' or 'property'. In any case in which the right of exclusion is exercised as against outsiders to a group, but not by members against each other, we may say that here there is communal ownership of communal property. But there may be many forms of communal property, because there have been many different forms of communal living.

In some societies widespread sharing of the produce is the rule. No one owns food absolutely because other members of the group have claim in the whole produce of the group, as

in the case with Lozi institution of Kufunda.⁵⁹ So is the case with other articles of every day use such as canoes. Thus in this case it can be concluded that it is not so much a case of defining exclusive rights of persons over things as a case of obligations owed between persons in respect of things. Such a communal way of living is thus to be found in rights of consumption irrespective of the formal control over the means of production. In such an economic system the large accumulation of goods is neither possible nor desirable. The question that arises is not who owns the means of production but what is done with the produce. In such a way of life the division of labour is the main aspect of communal life since each one is sharing in the produce of others. Such an economic system is termed [as] corporate or communal where the interest of one member does not clash with other members.

Another communal way of life is apparent where the means of production is held by the whole group, clan, or family, but their cultivation depends on each member of the group, none normally sharing his produce with others. A case in point is that of hunting grounds where the whole territory is held by the group but each is free to hunt without let or hindrance by others. Another is where the land is given to each member of the group only for a period of cultivation, after which the land reverts to

59. Gluckman, op. cit., p. 43.

Allott, A.N., "Family Property in West Africa: Its Juristic Basis, Control and Enjoyment", in Family Law in Asia and Africa, edited by Anderson, J.N.D., London 1968, p. 127

the clan for a fresh distribution in the next season. This is the case in Iboland, where there is a seasonal allocation of community controlled land to individual members.⁶⁰ The right of all the members of the community to a share of land sufficient for living is considered an essential attribute of being a member of the group. The whole land vests in the chief of the tribe. He grants primary rights to small groups or families within the group. These holders of secondary rights are free to use land for their own needs but have no right to alienate to outsiders. In certain groups succession is allowed within the family but if the family becomes extinct or leaves the group land reverts to the group. Again when fertility of land comes to an end after a certain period, the members of the group were given another piece of land to cultivate. Such a system of land tenure gives the family control over the land for a period and for a specific purpose. An individual member of the group cannot simply assert this control for himself alone but only on behalf of the family. And the family again except as a secondary holder cannot speak of unlimited exclusive control in the sense of Roman dominium. Thus the use of land as a unit of production in tribal societies, if not communism pure and simple, cannot either be termed 'individualism'. It is more akin to communism than to individualism. As Gluckman states:

Clearly land, as it is ultimately cultivated, is worked by individuals with secure and protected rights, but [as] representatives of their family, of their village.⁶¹

60. Allott, op. cit., p. 126.

61. Gluckman, op. cit., p. 41.

The interests discussed above are termed as communal where the over all dominion vests in the group, clan, tribe, or family. The ultimate control and allotment of land for the purpose of maintaining the members of the group provides the subsistence basis of the institution of property. Each member by virtue of being a member of the group has a right to subsistence and hence to the means of production was the idea found in the evolution of property.

But what is this tenure of Land? What is this economic system when an individual cannot do as he pleases to do with his land? He cannot sell, mortgage, lease etc. without the prior permission of the group. He cannot even bring an outsider on the land. This is clearly a communal system with an idea based on the right of subsistence for each member of the group. Each family has its lot which is the property not simply of a man but of the whole family whose different members must one after another, be born and die there. Allott describing the Akan property system states:

There is a sense in which it is appropriate to call the holding by the family members a joint holding, in that there is a single inseparable title to the family's property, and there automatically accrues to the survivors the right of any member who dies. But as new members of the family are born, so they are automatically added to the list of those who share in property, as joint controllers and users in common.⁶²

The relation was not between man and soil but between all the members of the family and the land. This can scarcely be a regime of private property. When the stress of maintaining

62. Allott, op. cit., p. 134.

equality is so much that each ruler distributes the land again and again, the liberty of private property in land can scarcely be said to exist. The members were given the right to enjoy, subject to general interests and, therefore, to the constant intervention of the laws of redistribution. Again a Lozi tribe in Africa insists that if some one leaves the village, he loses his right in the land. But so long as some one is in a village his being a member of the village obliges the chief to give him land for cultivation. This clearly brings out that the superior right to control the land does not vest in an individual but in the community, village, tribe, clan, or family. The idea of private property in the sense of complete control whereby an individual got the right of use and abuse has not yet developed. Such independent owners and ownership were non-existent in the primitive mode of living. Corporate ownership was the main type of ownership with different types of distribution and obligations within that system. Within this corporate system no one system of distribution can be laid down. Individual ownership, where an individual is the holder of the **exclusive** right of use and abuse, is a later development, and started with the breaking up of corporate unity. With the development of technology, the incidents of right over land varied and there came into existence the idea of holding private property in land which an individual can cultivate by himself. Rights of this kind can vary with the methods of exploiting the land.⁶³

There was a time in history when the idea that the

63. Herskovits, M.J., Economic Anthropology, New York 1960, pp. 9-11.

institution of property was to serve needs of each individual was almost accepted. The group or clan was the answer to this idea in the social context, and its legal manifestation was the notion of collective ownership. With social changes and developments of the means of production, when it became possible that a less amount of labour can produce more and, thus, can maintain some members of the group without doing any productive work connected with the necessities of life, the system of division of labour which was previously purely functional became a permanent hierarchical system.⁶⁴ The privilege of the head of the group turned into his right and he came to associate himself not only as a symbol of the group but as a proprietor and ruler of the group. His proprietorship, though subject to many customary restrictions, paved the way for the establishment of private property. And as time passed by, he made himself the sole arbiter in dealing with all social, economic, and legal matters. Thus there started an era of new property rights and a new life for the institution of property where the idea of fulfilling the economic needs of each individual got a back seat and there came into existence a system of private property where social and political power came to be associated with economic power. Again, with this change, there came an idea of dominance of one group by another as a source of social and economic power.

The land was not originally, in the earliest forms of social organisation, subject to private property. When outward

64. The Indian caste system is a case in view where the formal division of labour in primitive times, now became a hereditary system. It shows how the formal divisions became rigid realities with the passage of time.

Gluckman, op. cit., pp. 36-40, 59-63.

conflicts and social dissensions between groups take place, the victorious chiefs assume control of property and the vanquished people are deprived of their goods and became slaves or are slaughtered. Tribes, thus, must form a formidable unity under the direction of the chief. The tendency that appeared, which shaped the future course in landed property, was that land came to be regarded as belonging not to the community but to the chief. His privilege as nominal head changed to that of administrative power as the distributor of individual rights to the use of land. The chief who assumed the control of the property sowed the seed not for the immediate growth of private property but for the decline of the communal property. So among the agricultural people the origin of private property can be conjectured as an internal outgrowth of common property or family property. The latter yielded in different ways to qualified forms of private property, temporary, as a usufruct or life interest, but subject to control of the group under the chief as the main distributor of these rights. This precarious establishment of individual property is theoretically of great importance. First, it suggests the course of future development; second, it suggests the idea and may give rise to the desire for individual property.

With the introduction of agriculture, common landed property became individual property, but only temporary property, for the space of a life time, at the most. There was only a usufruct, the dominium, the eminent domain, continued to belong to the tribe. This change in the mode of enjoyment was the necessary consequence of transition from the pastoral to the

agricultural system. It is a characteristic of private property that as far as the right of transfer is concerned ownership is almost absolute. Land is not a mobile value. It was held within the group and it descends to its members although there may be certain preferential rights. As Manu says:

the right of pronouncing the prayers belongs to the son who came into the world first. He ought therefore to have all.⁶⁵

Free alienation was, thus, not allowed. It was almost unknown.⁶⁶ The right of pre-emption was recognised, and that pre-supposes sale. But what is this right of sale which could not be exercised without the consent of the clan of which one is a member? If the clan does not give consent, one cannot dispose of the land. But at least the idea of alienation entered the sphere of collective property and set the direction for development of a system of completely private property in the modern sense of the term. Even hereditary rights are not property rights in the modern sense since the hereditary course of descent is pre-ordained within certain lines, and cannot be changed. The owner cannot change the course of succession, it is automatic. Again what is this private property in land when a native of New Guinea is free to plant a tree on another's land without restrictions and is called the owner of the tree?

In the remote Aryan times the Hindu joint family was the social unit⁶⁷ comprising several generations, with common worship, common dwelling, and a common purse. Fustel is wrong

65. Manu IX: 105-107.

66. Fustel, however, gives religious reasons for non-alienation. he says that it was due to family hearth that alienation was not allowed, because religious sentiments would not allow the disintegration of family property.

Ancient City, p. 83.

67. Rig Veda x, 85.

when he says that this is the result of religious influence only; the family is an economic association necessitated by the material cultural conditions. The economic solidarity of several generations created by social conditions, united the family in a house community. Originally among Hindus the community of property was complete. As to land, after the passing of the early village community, there remained a collective family property within the family. The joint family by constant accretion became so numerous that the land could not support it, and separation automatically took place. Again, the liberty of their women folk indicates a change from joint family to individual establishment and thus of separate property. Private property started taking a toll on the joint family. Gluckman⁶⁸ cites the example of a small Polynesian island of Tikopia where due to the rise in population beyond the means of the land there came dismemberment of the group. The old and the infant died, or in extreme circumstances the chiefs might compel some commeners to put out into a sea whose nearest neighbouring island lay seventy miles away.

England, always supposed to have been from the days of Norman conquest subject to the feudal system, was shown to contain traces of collective ownership and common cultivation.⁶⁹ The Scottish chiefs who in the early days had only the management of the communal land later on became the owner of the communal land. In the course of time the power and lands of the chiefs became

68. Gluckman, op. cit., p. 55.

69. In the Domesday survey there are evidences of village communities, though scanty. This led many historians like Ashley, W.J., to doubt the general theory of village community in England.

hereditary. In the Highlands of Scotland, the chiefs of the clans sometimes distributed foods to the heads of the families, their subordinates.⁷⁰ Of all the European races, the Kelts preserved for the longest time the clan system. "The Irish Sept of the Brehon Laws live under the same roof and community of property. The tribe of the Brehon tracts is a corporate, organic, self-sustaining unit. The tribe sustains itself."⁷¹ A portion of the tribal domain, probably the arable and choice pasture lands, has been allotted to separate households of tribesmen. They hold their allotments subject to the controlling right of the entire brotherhood. The primary and fundamental rule is that they keep their shares of tribe land intact. "Every tribesman is able to keep his tribal land; he is not to sell it or alienate it or conceal it, or give it to pay for crimes or contract."⁷² Similar instances of joint ownership are found in Slavic and Russian communities.

From the evidence found by archeologists and from old legends, it is established that in Egypt before Sesostris the land was held in common. Sesostris was the first who allotted the land amongst all the Egyptians basing his whole fiscal system on this distribution of land. The pyramids of Egypt depicting the king at the apex, warriors, and priests in the middle and, at the base the servile mass, represents the social structure where the king is the absolute master of his subject. The division of Egyptian soil into three portions, one for the priests, the second for the royalty, and third for warriors, introduces

70. Maine, Ancient Law, pp. 268-269.

71. Maine, Early History of Institutions, London 1880, p. 107.

72. Ibid. p. 108.

strictly hereditary sub-castes. There could be no real private property in such a civilisation where property in land is mummified. In such a mummified organisation of society the life of a shoe maker is compared to the "health of a dying fish."⁷³ A similar division of land was found in Peru into three parts, "one for the sun - that is, public worship and the priesthood; the second for the Inca and his huge family; the third for the people."⁷⁴ The land given to the public was tilled in common and produce divided according to the needs. Again in Mexico similar division of the soil prevailed - the survival of the ancient communal system was marked in the management and worship of the folkland. "No Aztec owned a foot of land which he could call his own, with power to sell and convey to whomsoever he pleased."⁷⁵

In Russia, the village community system known as Mir was the survival of the communal system. Each of the Slav villages is a collective unit occupying a fixed territory and they all come from one clan. In primitive times the land was tilled in common, the harvest being afterwards shared among the families. The survival in Switzerland of something resembling the German Mark described by Caesar, and of similar practices in Scandinavia and in the Orkney Islands give evidence of a general prevalence of forms of property that must be called family estates rather than private property. The system of periodic allotments of land is incompatible with the characteristic of private property. So too, the restrictions put on the land allotted to remain within the community, the reversion of the land to the original domain,

73. Letourneau, op, cit., p. 146.

74. Ibid. p. 136.

75. Morgan, L.H., Ancient Society, London 1877, p. 203.

incompatible with the nature of private property. There is no place for absentee ownership. The social solidarity and the respect for communal living are not the result of mere gregarious instinct but at the bottom lies the corresponding mode of life led for a length of time and leaving at the end deep traces on the mental habits of a race. Fustel⁷⁶ remarks that rent paid to the Mir is a sign of private ownership of the Mir. But his conclusion is dubious. The use of the word rent interpreted in modern times gives the impression of private property but lack of terminology to express the primitive idea led to this conclusion. These rents are not rents in the modern sense but a type of village communal fund for running social, religious, and other managerial works of the community in the village. These rents were paid by all the people in the village in one form or the other. Similar rents were paid by Swiss Allmenden to defray public expenses.

Similar communal arrangements were found in the Javanese Dessa and the Abyssinian family estate. The Dessa is based on the principle of common property in the soil. The collectively owned soil was parcelled out under the direction of the village council. The crops are the property of the family collectively. The crops once harvested in, the land allotted to different families became common property again. Thus it was only usufruct that was granted in allotted plots and not ownership. The allotment gradually became a life interest and thus reached the door steps of private property. In Abyssinia the urge for family estate is so great that if there is any catastrophic event which uproots the whole

76. Fustel, The Origin of Property in Land, p. 110.

organisation, and if the members vanish, their children patiently await the opportunity to regain possession of the ancient family estate. When they are fortunate enough to succeed, the old arrangement is at once re-established.

This survey of various nations leads to the conclusion that the origin and growth of the institution of property has carried with it similar ideas and spirit in its development - sometimes representing through the tribe, clan, group, or family. Communal property seems to be an almost universal precursor of private property. The early forms of property are thus natural in the sense of being the natural product of the early state of social life. The forms natural in the present state of society are those which are in conformity with the development of human society and civilisation expressing the social and economic structures of the present day.⁷⁷

77. Some writers like Austin speak of mature systems of law thereby implying that primitive systems were not mature. The very use of the word 'mature' to describe a system is misleading. In the first place it is very difficult to draw a line between mature and immature systems, because no system is stable, it is always in process of growth. One cannot say that whatever Bentham wrote was immature, it would be a paradoxical dismissal of him, since now there is an improvement over his thought. Bentham's writings and his thoughts were considered mature in his period. Thoughts and ideas are always in the process of development. To judge the past with the present standards is a fallacy. If we continue this way of thought the present will blame the past, and future will blame the present. It may be true that future is the criticism of the past in the same sense as a good man is the criticism of the bad man. The emphasis of the future on certain aspects and values is not arbitrary, but is itself an interpretation, and his answers are to be discounted, his questions are nonetheless evidence as to the assumptions of the period in which they were asked. So to say that Bentham's ideas are immature is to say mankind is still to wait for an ideal utilitarian.

Every system is mature in its own time. If a particular system is sufficient to fulfil the needs of the society at a particular period, it is a mature system. The development of the system does not represent the maturity of that system but only the capacity to meet the new social needs which were not there before the development.

The monarchic tribes in their initial developments have not yet lost their tribal equality. During the republican stage social solidarity and common property existed as a condition of social existence, and secondly, no values were developed which could be accumulated with a sense of exchange. As soon as the sense of exchange developed, the old republican solidarity and equality vanished, there were divisions into rich and poor. Power came to be closely connected with wealth and servile classes came into existence.

During the pastoral stage when animals were being domesticated, their value was regarded as so great that they were being preferred to human beings. The only exchangeable things were at first children and women. Slavery was not unknown in earlier phases of human society. The importance of an enemy was realised in terms of food value. But with the development of pastoral stages into agriculture, the economic value of slaves was recognised. The captives of war were not killed any more, but instead made to work for their captors.⁷⁸ The slave trade became a lucrative business though cannibalism under another guise continued as among the Mexicans.⁷⁹ The agricultural operations became more extensive and fresh capital (slaves) capable of accumulation and negotiation was the result. Henceforward richness and poverty came to be associated with the number of women, children, and slaves. This social hierarchy became a solid basis, and individuals started feeling the

78. Thurnwald, R., Economics in Primitive Communities, London 1932, pp. 194-195.

79. Letourneau, op. cit., p. 128.

luxury of idleness. Chiefs and nobles came at the apex of society with idle habits and idle wealth. Landed property still remained an eminent domain of the community but nobles began to assert their voice and their presence came to be felt in the community. The privileges they enjoyed tended to become their rights. As Lowie states:

By usurpation of prerogatives not originally vested in him he was able to make special levies and even to obscure the original form of tenure to the extent of figuring as an overlord to whom the tenants were personally subject.⁸⁰

The lords, thus, made themselves associated only with rites and rituals rather than with the production of everyday necessities.⁸¹ The nobles who were at first the elected members of the community, turned this system into an hereditary system.

Fustel traces the origin and development of property to religious influences. Not only the institution of property, he traces the origin of other institutions like village communities to religious influence. But this contention cannot wholly be accepted. Religion has played a role but it cannot be accepted as the sole factor in creating any institution much less the institution of property. Property arises from an agglomeration of social and economic causes. Village communities to which an earlier origin of property in land is traced, are not the result of religious factors but of economic and social factors as well.⁸²

80. Lowie, Primitive Society, p. 215.

81. Hunt, E.K., Property and Prophets, The Evolution of Economic Institutions and Ideologies, London 1975, p. 4.

82. If we accept village communities as a result of religious influence, its further developments when slaves and strangers were included because of their economic importance cannot be explained by religion.

Religion in neither wholly responsible for the earliest nor for the later developments. The religious ideas were, however, influential in creating monarchic societies along with other economic and social factors. The same ideas, however, are responsible for creating an urge and unsatiated desire for private property. As Manu says:

The world being without a king, was overwhelmed with fear. The Lord created a king, formed of particles drawn from the very essence of the eternal particles of the substance of Indra.⁸³

He further states:

Whatever exists in the universe, is all in effect, though not in form, the wealth of the Brahmen, since the Brahmen is entitled to it all by his primogeniture and eminence of birth.⁸⁴

Such religious importance given to the nobles took away the domain from the community and gave it to the nobles. Likewise Mohammedan law and its spread by the force of sword altered views concerning property; the earth is the Lord's and He giveth it as an inheritance to such of his servants as pleaseth Him.⁸⁵ So Mohammed, himself, in his capacity of God's envoy divided land and gave title deeds to the lands, thus breaking the closely knit community system of the Arabs based on collectivism. Similarly the establishment of the Hebrew monarchy⁸⁶ broke the power of the family heads and glorified the kings. This loosened

83. Manu vii, 3-5.

Gierke, Political Theories of the Middle Ages, Cambridge 1958.

Hunt, E.K., op. cit., pp. 36-37.

84. Manu I.100.

85. Letourneau, op. cit., p. 200.

86. Ibid. pp. 211-212.

Lee, G.C., Historical Jurisprudence, London 1900, p. 104.

the grip of the family bond. Through the rapacity of kings and the plunder of neighbours, through the practice of subsequent debts and interests on loans learnt through contact with Babylonian laws, the institution of private property was developed. Slaves became numerous and were classified into various categories.⁸⁷ This was private property.

The superior role and position of the chiefs and their close associates made them nobles within their circle. Though the property still remained a domain of the clan, yet their greed and neglect of paternal duties established their individual desire for private property. Thus the satisfaction of the needs of all through the common stock changed its function through the greed of a few into the satisfaction of the desires of a few. As Schlatter expressed it:

Into this ideal arrangement came avarice: 'craving to sequester and appropriate something to itself, it succeeded only in making everything somebody else's and reduced itself from the immeasurable to the inconsiderable.' Avarice dissolved the partnership and impoverished even those whom it made richest, for in their desire for personal possessions they forfeited universal possession.⁸⁸

Personal advantages outweighed social obligations. "Individual desire is given freedom under the continuance of the same

87. Ibid. p. 209.

88. Schlatter, R., Private Property, London 1951, p. 26.

unifying forces that produced the larger social units of which these persons became the autocrats."⁸⁹ Such ideas imply that private property is not natural, and is the result of usurpation of privileges, which the chiefs enjoy because of their superior capacities and roles within their communities, under the guise of maintaining law and order.

After the period of communal living in tribes, the Mexican social structure passed into a society of master and slaves, and, thus, the idea of rich and poor associated with the 'number of hands' one possessed. The head was an elected member of the clan. The monarchy though elective, became absolute. The king claimed eminent domain to himself. The feudal system established itself as a common phase of social structure. "The house of Tsin (254 B.C.) instituted private property ... there were rich men, who began to monopolise land and farm it out."⁹⁰ The old Brehon law destroyed the family communal living of early Ireland by rendering the chief's share hereditary.⁹¹ Thus it was that, the right of private property was usurped by the chiefs, which eroded away the early system of communal living and in the end created a real proletariat. The fact of their political power became associated with their economic power instead of their ritual role within the community. The chiefs attached servile men to themselves, by loaning them part of their herds, leasing land to them and

89. Underwood, J.H., The Distribution of Ownership, New York 1907, p. 32.

90. Letourneau, op. cit., p. 160.

91. It is how privileges turned into rights.

when with the increasing of population, the land became valuable due to its scarcity, he also took from them whatever small tract of land was left with them. Such transformation of communal property into private domains became a common phase in social evolution; it may not be a necessary phase. Though all restrictions introduced in the times of communal living still existed, yet inroads on the concept of communal living by allowing alienation, no matter under whatever conditions, paved the way for the growth of private property.⁹² In theory private property was not recognised but in practice private property flourished.

Originally the head of the group or family did not have an unfettered power of alienation; for that consent of the group was necessary. But by a process of gradual change dominium became more or less private property in our sense, that is, a right obtainable by other individuals than those entitled to the headship of a family or group by birth. Under Hindu law sons were being allowed to keep their property as separate property which they acquired by chance without the help of family property. This was a serious blow to the right of property which was earlier vested in the person of the head. The movement towards individualism became more decided when the right of property was granted to women.⁹³ Once these sweeping reforms were introduced the way was open for a gradual move from collective ownership to individual ownership. Fustel⁹⁴ remarks it is the decay of the common hearth, that is, of the ancient family based religion that

92. Derrett, J.D.M., "Family arrangements in developing countries", in Family Law in Asia and Africa, edited by Anderson, J.N.D., London 1968, pp. 156-181.

93. Ibid. p. 168.

94. Fustel, Ancient City, pp. 76-110.

aided in the establishment of private property.

With the disintegration of the household and the increase in private property, the class hierarchy came into existence. As Underwood states:

With liberty to own land privately, liberty to own men privately also increased. Everywhere men were changed from individuals in the household of the patriarch to items in his inventory of live stock. As the personality of the few was elevated, the personality of the many was depressed.⁹⁵

A class society arose consisting of rich merchants and substantial land owners. With these developments the passion for usury became a general rule. The sanctity of ownership was defiled by money and trade, and, as Aristotle⁹⁶ writes, by the unnatural gain from money rather than service. Whatever be the distinctions that came into existence between different types of properties, there was definitely a movement towards emancipation and practical abolition of the communal system. Private property was firmly established and recognised and freed itself from the clutches of primitive property. But in the primitive systems of property, since the property system was corporate and since this provided security to the individual, subsistence was the basis of the institution of property carried out through the corporate unit. In modern times the need for such a system is felt, but it is the drawback of the present existing institution of property that it has failed to meet the subsistence needs of the majority of people, which have instead of long ages come to be fulfilled through the establishment of 'welfare states' (through such institutions as social security, old age pensions, etc.) These

95. Underwood, op. cit., p. 36.

96. Aristotle, Politics, book 1.10.

measures though partially adequate but have atomized society.

The origin of property is always a debatable question due to the difficulties of obtaining reliable information. It will remain warmly discussed and obscure, open for further research. One can only support, criticise, and analyse the material forms of property, but its legal form is far from clear and is only a later development. A man's ownership was not often symbolised, as at present, in other than material possessions in most cases. The show of some kind of visible symbol was necessary. Maine⁹⁷, however, traces the idea of corporate unity to the village community. When the village community, clan or family provided the only economic and social security, there is little or no private property of any sort, the ownership of corporate privilege can, however, be appreciated and recognised as ownership of family assets and land. When this corporate unit narrowed down, the idea of corporate privilege still alive, took a different turn. The individual as a unit came to acquire the idea of his personal ownership of property. The only feature that made this earlier idea distinct from the later idea of ownership, is the collective ownership of the group, and, second, the visible separation of the earlier idea of material possession. With the development of the idea of ownership, the idea of joint obligation was replaced by the idea of individual obligation seen as a means to greater social efficiency. Man is a social creature, but the institutions through which his sociability could express itself have been weakened or even destroyed. Thus the two institutions viz, communal autonomy and communal

97. Maine, Ancient Law, p. 183.

property on which the primitive concept of property was based, reflecting the idea that the institution of property is to fulfil needs of each individual, had given way to individual property.

With the changing economic and social conditions, the notion of property had changed. The only thing that remained constant is the concept itself. It looks, therefore, as though the institution of property, in some form or another, was so far essential to all kinds of human society. It may be regarded as a part of the make up of the universal human social order. The forms of property in which it expresses itself vary considerably with time and place, as it is stated:

The institution of property and the accompanying philosophical and protojuridical justifications have changed and will go on changing to meet the demand of an ever changing society and its culture. Static models of culture are useful but unrealistic analytical tools. Concepts of property are subject to the endless erosion of time.⁹⁸

Institutions are always of variable growth, the static element is the notion of the institution itself, their diverse forms, conditions, and modifications are always susceptible to unforeseen changes.

Many jurists like Locke believe that property had its origin in occupation. In the beginning all things in the world were res nullius, that is, without an owner. The first occupier got the best title and is thus an owner. So plausible indeed is the idea that one is entitled to take possession of what one discovers, that it has been suggested that the practice is in

98. International Encyclopedia of Social Sciences, vol. 12, p. 592.

Hearn, W.E., The Aryan Household, London 1879, p. 411.

Maine, Ancient Law, p. 264.

Laveleye, Primitive Property, London 1878, p. 338.

accord with a fundamental human instinct.⁹⁹ This view is supported by the fact that occupation is one of the methods by which primitive people acquired property. But if things were *res nullius*, why was the first man who acquired property disturbed? Why did the weak come to seek protection of the strong? It was because such occupations were not recognised to constitute property. If this were so, nothing was *res nullius*. The restrictions we find in primitive societies on sale of property, whether moveable or immoveable, point to the conclusion that mere occupation of *res nullius* was not recognised and, therefore, nothing was *res nullius*.¹⁰⁰ The theory of occupation put forward by Roman jurists on the basis of natural law contradicts their own practice. Romans did not allow the occupation of enemy land by individuals. Enemy land becomes the property of the state rather than of an individual or even of an individual army. Again the reforms of Servius, Constantine, and laws of Lucian for redistribution of property in order to avoid popular upheavals was much against the spirit of the theory of occupation. Even in case of moveables, it was the law that made them *res nullius*, they were not considered *res nullius* in themselves.

99. Locke regards labour the basis of property. The occupation of anything with which man mixes his labour becomes his. Locke's theory, thus, is the same as occupation. Not all land has passed through the stage of individual ownership. Forests and meadows are the instances to which man has not mixed his labour. On Locke's theory of labour their ownership cannot be explained.

100. Maine, Ancient Law, p. 268.

Laveleye, Primitive Property, p. 544.

Kant, Philosophy of Law, translated by Hastie, W., Edinburgh 1887, ch. 1.

The victors captured moveables and kept them as their prize according to the established practices and rules. Referring to the idea of *res nullius* Hunter states:

The suggestion that ownership arose when men began to respect the rights of the first occupier of what had previously been appropriated by no one is curiously the reverse of the truth.¹⁰¹

It was the social order that gave recognition to any occupation to constitute property. Before this occupation and without this recognition there was no property. For the establishment of an institution its recognition, the existence of some sort of social order from which normative values and standards follow, is a necessary condition. Even if we suppose that the whole world was *res nullius*, it can only be if some social order so recognises. A first finder is an owner only if it is so determined by the social order. Even in the case of wild game an individual becomes owner only if the social order so determines it. No man's land recognised in modern times between two countries does become so only when a state or two states make an agreement to it. If therefore one of the states occupies that no-man's land, she does not become an owner thereof. So there is no *res nullius* in nature. Things are made *res nullius* by law. All the natural goods available to a society are perceived from the very beginning as belonging to the whole society, no matter whatever be the form of society, and whatever be the nature of property. Bentham rightly argued that property and law are born

101. Hunter, W.A., Introduction to Roman Law, London 1965, p. 48.

together and die together.¹⁰²

It has been found from the foregoing analysis that property could be held in different ways. But one constant theme that is generally found in all this confused mass of differing details is the desire to secure to everyone subsistence; this, I submit, is the primitive basis of property, and that of those limitations on the acquisition of property which are aimed at maintaining social stability. This role of property struggling to stabilise the social order is visible throughout the history of the origin of property. Despite all the fluidity and variations in the nature of property, despite variations in the intensity and extensivity of the right of property, and despite variations in techniques used to maintain property, that it should function as a stabilising force in society was the paramount goal of different thinkers through different philosophies everywhere. In different societies conceptions of property have varied according to the political and economic structure of the society. One cannot expect the same conception of property to be held in different societies. But what is clear is that in all types of societies the superior power of the community always stands over the rights of individuals. In all systems and in all forms of social orders, society in any form

102. Bentham, J., The Theory of Legislation, London 1871, p. 113.

There is a general disagreement as to what Bentham meant by law. To Bentham law was practically what we call social order. For he says:

If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law.

Thus Bentham's legal theory of property interpreted as representing law as social order supports the view that rights are recognised as a condition of social order. Without this social order there is no property.

whether as a group, clan, etc. has always stood between man and complete control over his possessions. Varying degrees of totality of possession are reflected in the evolution of property. The aspect that is clear in the evolution of property is that the institution of property grew up to answer economic needs of individuals, though in the later developments economic needs are answered by the institution of property in multiple ways, setting aside its basic function of directly satisfying immediate needs of each individual. Fichte keeping in mind the purpose of the institution of property is to guarantee the use of things so that a man may be able to live. To secure this end of the institution of property, he states:

From the moment that any one suffers distress, that part of the property of each citizen, which is necessary to remove that distress, no longer belongs to them, but in law and justice belongs to the suffering individual ... and this contribution to the distressed is as much condition of all civil rights as the contribution for common protection.¹⁰³

The stability of social order does not lie in the security of maintaining free market forces, but as Fichte insists in maintaining the institution of property on basis that it serves needs of each individual, so that there is no poor man.

We have spoken of property satisfying the subsistence needs of individuals; such needs include the physical and economic, but go beyond those levels. It is not only in modern 'admass' societies that people can obtain a sense of their identity in physical belongings, as a sort of external expression of the self. To achieve such a sense of identity and of one's self is,

103. Fichte, J.G., The Science of Rights, translated by Kroeger, A.E., Philadelphia 1869, p.293.

in my submission, not the least important of the needs which a property system has to meet. In this sense, property has an essential 'subjective' element. There is ample evidence of this even in the most primitive systems.¹⁰⁴

In relation to moveable things, in which individual ownership develops earlier, we saw, for example, the owner's weapons and other personal effects are buried in his grave. They are buried because it is believed that they form a part of his personality. This habit of looking at his personal effects reflects the idea that ownership goes beyond the economic and physical needs of the individual. Thus it is not that external things just exist as external objects of sensation but they are valued because they can be a means of externalising and concretising the self. External objects are part of the surroundings of the self without which the existence of the self, ~~as~~ of society, becomes difficult. When we are dealing with these facts by institutionalising them, our institutions can work properly only if we find our intrinsic values for self satisfaction expressed through them. We do not base our institutions upon deductions which have no connection with our conduct but on principles upon which depend the regulation and stability of our selves.

Even in the case of the communal property systems which in various forms characterise primitive forms of property in immoveables, a similar subjective element is observed. Gluckman¹⁰⁵ states that a bushman who has cleared a garden finds himself not only in possession of it but believes that there is some close

104. Thurnwald, R., op. cit., p. 186.

105. Gluckman, op. cit., p. 53.

connection of an almost magical nature between him and the patch of land. Such a close connection is more evident in the case of incorporeal things such as songs.¹⁰⁶ The sense of family identity located in family property has been stressed before in case of family property in Abyssinia.¹⁰⁷ Even in contemporary Scotland the continued (and wholly anachronistic) association of 'clans' with their ancestral lands (evidenced by the widespread sale of clan maps) represents an interesting survival of this view.

To ignore the subjective element of the institution of property and to accept an unanalysed view of ownership solely in terms of marketable values is to miss a vital part of the institution of property. All those values which are for the satisfaction of the self as an individual or as a member of the community and which can find expression in the external world are part of the institution of property. Even in a commercial economy, when a man is selling his business it is not only for physical assets but also for the subjective value - the goodwill - that he gets paid. This subjective element is an important element in all types of ownership. Its significance will be further considered in the next chapter.

106. Lowie, R.H., " Incorporeal property in Primitive Society ", 37 Y.L.J., p. 551.

107. Letourneau, op. cit., p. 156.

CHAPTER III

DEVELOPMENT OF THE CONCEPT OF
PROPERTY AND RELATED PROBLEMS

The institution of property has both psychological and physical connotations. An individual's control over things both expresses his subjective self and is objectively a means of satisfying his needs. For example, in the earlier stages of the evolution of the institution of property the belongings of an individual are buried or burnt along with his dead body, since his things express and reflect his personality. Ownership reflects personality, the subjective element, which is more intimate than the mere control over external objects. With social changes such practices as the burning or burying of a dead man's belongings are still observed as symbolic gestures, but because of the economic value of the objects the things are not actually destroyed. With the development of social restraints on economic resources, such elements of the institution of property, still exist in abstract values though concrete examples of actual destruction of a dead man's things are rare.

In the course of development of the institution of property from corporeal to incorporeal property, the subjective element of the institution of property is to a greater extent ignored. The external physical objects out of which the institution of property emerged to fulfil needs of individuals (both subjective and objective) start engulfing the acts and activities of individuals by giving these acts and activities solely economic contents like external physical objects though separate and independent of them. The external physical

objects which are given economic contents (monetary values) became so dominant as to leave little room for human aspirations expressed through the institution of property. Such developments set aside the subjective element found in the institution of property and leave social problems unsolved where human beings attach immense value to things irrespective of their economic contents, or where certain things are so valuable to human existence that they are as important for human existence as any economic object. Thus in seeking solutions to the problems arising out of present day complexities of social life through the institution of property difficulties arise if we are considering rights to which monetary value cannot be ascribed. The significance of private property is most commonly seen in terms of an impersonal inventory of purely economic value (monetary value), not in terms of an expression of personality.

Modern legal practice largely ignores the subjective element of the institution of property and rights of property are envisaged in monetary terms. This serves important purposes in industrial and commercial civilisation, but the satisfaction of the spiritual self through the institution of property is left behind. Modern thought has drifted away from the subjective nature of the institution of property. Property rights have been interpreted solely in monetary terms. New notions of purely personal characteristics, such as ideas, are emerging but can only with difficulty, if at all, be recognised as property interests due to the application of orthodox and traditional criteria. It is not to be understood that pecuniary considerations are not required or are not essential. The strong personal elements in the institution of property

find their expression in the external circumstances through economic values. But in the case where things do not admit of economic value, as one's skill at playing hockey,¹ the monetary criterion as an insignia of ownership fails to recognise it as a property right. Things are property before they acquire any economic value and not vice versa. Thus there is a need and a plausible case for revision of the traditional and orthodox criterion of monetary value as an insignia of the objects of property.²

The institution of property grew up to answer needs of individuals. In the course of development, financial arrangements became substituted to meet needs of individuals. But it is wrong to regard financial arrangements as an insignia in deciding which rights are property rights. These financial arrangements, however, over-shadowed the subjective element of the institution of property, and the monetary aspect, in modern times, became the dominant aspect of the rights of property. This is how the subjective element in the development of the institution of property has been lost.

Institutions arise and develop not on the basis of rational planning but in response to social needs and changes. The laying down of rules will not establish the desired results since they are always modified by circumstances. The true order of their evolution is that under certain

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1. Rowe v. Hewitt, (1906), 12 O.L.R. 13
Quoted in Robinette, J.J., "Protection of Property Interests in Equity", Can.B.R., 1932, p. 174.
 2. Note that on p. 40, the notion of 'value' was seen to be essential to the definition at least of 'incorporeal things', but 'value' was taken there as expressing more than merely monetary value.

circumstances and accidentally favourable conditions, a certain type of practice is introduced which is an exception to the current usage. Its influence spreads gradually by a mere chance of its being comfortable and acceptable. A rapidly operating association of ideas makes the practice at once familiar and cherished, and this leads to the establishment and recognition of institutions. Amos, while writing about the growth of institutions, states:

After a time, and at repeated intervals, a disruption of the practice is attempted from one quarter or another, and with more or fewer circumstances of violence. The thought and feeling of the community are roused to conscious activity. The fact of the prevalence of the practice, the true nature of it, and the extent of it are submitted to examination. For the first time, also, the ethical or material value of the practice, and the true modes of testing that value, are also called in question. All these critical processes are, indeed, very gradual ones; and while they are, at first, accompanied by the most hesitating and almost awestruck reluctance, they continue to be executed with increasing vigor and self-confidence throughout the whole life of the nation, till the nature, limits, and value of the moral idea or institution are finally limned out in the clearest possible shape.

In this way institutions evolve and their process of growth, rather than creation, out of the social philosophies and needs of the time produces a body of principles to regulate their further evolution. They, thus, assume much of the character of true laws. History does not wait for human planning but adopts its own course through the social strata. This is what one finds in the development of the institution of property. It developed not as a system legal or customary but out of a hotch potch of social needs, expressing physical, intellectual, and ethical needs of society, the absence of which would be incompatible with the development

3. Amos, S., The Science of Law, London 1874, p. 153.

of the institution of property. No sounder evidence can be given of this evolutionary process of the institution of property than by Professor Hamilton.⁴ These are the illuminating examples of the spontaneous and natural evolution of legal rules out of life itself without any outside intervention. Such developments are the natural and necessary requirements of life itself.

If one takes an objective view of the facts, it appears that the growth of institutions and their changing and differentiating forms are the outcome of needs and conditions of the time in their entirety.

Theorisation into doctrines is a result of later rationalisations. State control steps in to guide and support by its power. As Noyes states:

Organisation is always a result of the necessity for it, and its forms develop out of past habit, modified by the reaction of different types of human nature and capacities among themselves and to circumstances, and by changing conditions.⁵

But one who studies the growth and development of the institutions often ignores the rudimentary conditions of their rise and development and lays stress on the various sets of rules and on the firmness of their protection. This amounts to misrepresentation in the formulation of basic theories of institutions. Holmes explains and analyses how the new rules come into existence completely ignoring their source and cause of origin. He states:

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4. Hamilton, W., "Property Rights in the Market", J.L.Pol.S., 1943, p. 10.
Pollock, F., A First Book of Jurisprudence, London 1929, p. 134.
 5. Noyes, C.R., The Institution of Property, London 1936, p. 416.

A very common phenomenon, and one very familiar to the study of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.⁶

Such ignorance of the cause, source and necessity of rules causes misrepresentation in the explanation of supposedly new rules. To ignore the old forms and think of them as a deliberate creation is, thus, to misread the facts. One should know the genealogy of the rules to have a proper understanding of them. The ignorance of social origins in the case of institution of property is the cause of much confusion in the present notion of property, though at present general opinion regards the institution of property as having reached its zenith.

The grouping of persons established on patches of land was the first indication of their sense of security which was the precursor of the institution of property. Property grew out of this human desire for security which persists even today. This is the first metazoic social fact. The institution created for social security 'fundamentally political, domestic, and economic' resulted as a 'system of control' over objects and men. So in the beginning social control, though it may vary much in its force and firmness in different times and different conditions, includes both human beings and external objects. We find

6. Holmes, O.W., The Common Law, Boston 1945, p. 5.

many examples to substantiate social control over men and objects alike from sociological and anthropological studies, and an outstanding example is slavery. But in the course of history social control over men and objects became separated under different names: domestic, political, and economic control. It is the latter with which I am concerned in this chapter.

Any discussion of or reference to the institution of property immediately takes one's mind to the remarks of Blackstone:

In the beginning of the world, we are informed by holy write, the all-bountiful Creator gave to man 'dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth on the earth'. This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been or started by fanciful writers upon this subject.

Without giving particular credit to Blackstone's theological premises, we may follow him in the assertion that the institution of property in all its perfection is from the beginning a control of things. It is a system of control over external objects. Even at present to a layman his belongings are his property, the belongings of which he has a visual and effective control. And whatever be the nature of control and things, in modern times, it is only a revised and modified version of the original pattern. With certain reservations, in modern juristic writings,⁸ it is acknowledged that exclusive control over external

7. Blackstone, Commentaries, London 1830, pp. 2-3.

8. Salmond states:

In the narrowest use of the term, it includes nothing more than corporeal property - that is to say, the right of ownership in a material object, or that object itself.

Jurisprudence, London 1947, p. 424.

(See over)

physical objects constitutes ownership. After excluding human beings (slaves) from direct control, control confined to external objects became property. In modern times both the concept of control and objects of property have undergone tremendous changes.⁹ These changes go along the social and economic changes. Legal recognition of incorporeal things like promissory notes is one among the new developments in the institution of property which stemmed from rapidly growing industrial and commercial developments. One can only guess as to new developments or as to any end of these property productions. Intellectual production changes the character of material production. New kinds of non-material property are continually developing and are constantly being extended to cover more and more grounds. Only a century ago all these non-material rights were, generally speaking, of insignificant

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8. (Continued from previous page) Keesling states:

The simple idea of property and ownership which originated in physical possession of object and things have been greatly extended and have become exceedingly conceptualistic and complex. Not all the developments are consistent either with the original ideas or with one another. Nevertheless, there is no necessity of discarding the time-honored and widespread usage of the term "property" which identifies it with objects and things which can be used and possessed more or less exclusively. Although it is sometimes convenient to refer to rights, powers and interests as property, and although this usage facilitates the obtaining of answers which it is believed are correct, there are compelling reasons which can be urged in support of the first usage and against the second . . . It is claimed by Hohfeld that the first usage is loose and ambiguous and that the second usage is more discriminating and accurate. Actually, the reverse is true.

"Conflicting Conceptions of ownership in Taxation", Cal. L.R. 1956, pp. 874-877.

9. Philbrick, F.S., "Changing Conceptions of Property in Law", University of Pennsylvania Law Review, 1938, pp. 691-694.

practical importance, but in modern times no exhaustive enumeration of these rights can be given.¹⁰ The present conception of property is far removed from its prototype as is the constitution of the modern family from its prototype.

In the early groupings control includes both human beings and external physical objects; its subsequent separation into control over human beings and control over external physical objects narrowed down the field of control so as to constitute control over things as property. Thus the single form of organisation and homogeneous control became diversified. This long history of the institution of property from its simplest mode in primitive times, though vague, has become in modern times a highly complex structure though in many ways extremely precise and easy to understand. But the modern institution of property has become a make-shift arrangement for practical purposes and lost its grandeur to fulfill the needs of the individual both economic and non-economic, material and spiritual. As Amos states:

It is not material wants, hopes, desires, and tendencies alone to which ownership lends its aid as a potent instrument of satisfaction and even development. The moral aspirations and needs of individual man are scarcely less signally sustained and gratified by ownership than the material. And this gives rise to yet a third aspect in which the fact of ownership and laws admit of being presented.

This error of ignoring the subjective side of the institution of property is due to the fact that the research into the true nature and extent of the

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10. Kruse, V., The Right of Property, translated by Federspiel, P.T., Vol. I, London 1939, p. 75.
 11. Amos, The Science of Law, p. 155.
Kruse, op.cit., Vol. I, p. 75.

right of property has been neglected. The increasing number of juristic writings¹² and lawsuits concerning these questions are steadily growing.

The rise, development, and recognition of the monetary criterion as a basis of ownership through courts and juristic writings

The law, of course, cannot prevail if it stands alone. It is obeyed if it goes along with the practice of society. It is avoided when the conditions of life impel the actions of men in the opposite direction. During the long course of the development of the institution of property, the practice of society turned against treating men and external objects alike as objects of proprietary control. Successive changes and developments in social needs and practices impelled the separation of control over men and over external objects. With this break-through the control over external objects established itself as an independent institution of property separate from other forms of control such as domestic control. The accumulation of external objects for immediate and later use as the product and reward of individual's labour is the result of this break-through which sets up the institution of property as an independent institution. It is control over external physical objects in this sense that constitutes property. This sense of control of something controlled, something taken or held for one's own use, is the chief incident of ownership. Originally applied to physical objects, the term was broadened and enlarged to include the idea of property in incorporeal objects. Ownership thus came to consist in control over both corporeal

12. Dennis Lloyd, "The Recognition of New Rights", C.L.P., 1961, p. 39.

Turner, A.E., The Law of Trade Secrets, London 1962, pp. 382-386.

and incorporeal objects. Incorporeal objects are relational processes which exist as objects of property as though they were entirely separate and independent of corporeal objects. They are adjuncts to property in corporeal objects, for in all cases they involve property in corporeal objects in their exercise. The only identification mark common to both corporeal and incorporeal objects of property is their economic value; even material objects have come to be treated as property principally on the ground that (and to the extent that) they have economic value.¹³

Incorporeal rights have only an approximation to ownership, for there is not any general power of use and enjoyment, only the receipt of profits as in some cases increased by the particular advantage of exclusion of competition. A patentee has not any right to do what he could not have done without a patent, but the right to prevent other people from competing with him in the manufacture and sale of his invention. Whether the law shall confer such monopolies on authors and inventors, to what extent in point of duration and otherwise, and subject to what conditions, is a question of expediency on which little,

13. Lawson says:

For ever against physical objects such as cattle, motor-cars, ships, houses, and plots of land the law sets abstract things which cannot be perceived by the senses but only received by the mind. Some of those which are most readily apprehended are debts, shares in companies, and industrial property such as patents or copyright. All that can profitably be said of such abstract things for the time being is that, like physical objects, they are objects of value, for which men will give money ... The best way to see what property means for practical purposes is to ask what a man of substance might leave at his death for his executors to pay death-duties on.

Introduction to the Law of Property, Oxford 1958, pp. 5-15.

if any, light seems to be thrown by the institution of ownership in corporeal things notwithstanding that the analogy has been dwelt upon as a valid one.¹⁴ Property, thus, has become intangible and incorporeal both in the 'sense of control', and the 'object to be controlled'.

In the English and related legal systems the fact whose influence upon the conception of property has been enormous in its generous recognition of incorporeal things¹⁵ as objects of property is equity.¹⁶ In modern times the total value under our law of proprietary rights in incorporeal things is enormously greater than the value of corporeal things. The modern incorporeal property includes copyright, promissory notes, bills of exchange, shares in companies, etc. The development of incorporeal things as objects of property owes much to equity.

In the earliest emergence and development of equity as a full-fledged system of jurisprudence, the institution of property occupied

14. Pollock, F., A First Book of Jurisprudence, p. 203.
15. Lowie, R.H., however, states that even the primitive people have such recognition of incorporeal things as songs, myths, dances, the right to use certain incantations or make use of certain sacred vessels and other rights of similar character, as objects of property.
"Incorporeal Property in Primitive Society", 37 Y.L.J. p. 551.
16. Another factor in the development of incorporeal things as objects of property is found in the medieval laws covering all instances of apportioned use of property. This apportioned use as property is the direct result of social and economic conditions of those times. Agricultural economy of those days and the political set up, land the chief wealth of society was apportioned on the basis of use and enjoyment. This use and enjoyment became proprietary rights and, thus, created a chain of incorporeal objects as objects of property.

one of the most important places in the social life of the community, being much more important than the personal or political rights.¹⁷

Consequently, equity, in supplying the deficiencies or lack of remedies in the common law courts, found itself engaged with matters of ownership. This might be one of the reasons why courts of equity normally interfere only where there is proprietary interest.¹⁸ Equity relief by way of injunction has commonly been refused in other cases on the ground that equity only interferes for the protection of property interests.¹⁹ The equity judges reacted against this self-imposed limitation by evolving a pecuniary criterion, the economic value of an interest, to extend equitable relief to such interests as seemed to them worthy of protection. As Scott suggests:

In the back of the minds of the equity judges considerations of economic expediency have had force. If the doctrines based on conscience had not been commercially expedient, they could not well have survived.²⁰

In this way there developed a category of rights enforceable in equity which because of their pecuniary value were assimilated to property rights in common law. For example, it came to be considered a

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17. William Q. DE Funiak, "Equitable Protection of Personal or Individual Rights", Kentucky Law Journal 1947, p. 7.
 18. Later developments of courts of equity clearly show that equitable relief was being granted in cases other than property interests.
William Q. DE Funiak, op.cit. p. 11.
Pound, "Equitable Relief against Defamation and Injuries to Personality", Harv. L.R., 1916, p. 640.
 19. Robinette, J.J., "Protection of Property Interest in Equity", Can.B.R., 1932, p. 172.
Bispham, G.T., Principles of Equity, New York 1922, p. 465.
Cross and Hall, The English Legal System, London 1964, pp. 133-134.
 20. Scott, A.W., "The Nature of the Rights of the Cestui Que Trust", Col.L.R., 1917, p. 280.

violation of the right of property if one party to a transaction uses his right to the disadvantage of the other party. Limitations on the behaviour of others to protect a man's property right became property. This led to the development of the conception of property in cases where physical objects were not directly involved as the immediate object of property but equity developed its own concept of ownership to cover interests other than those previously considered proprietary.

A fundamental principle in equity is that whenever one person (A) has conducted himself so as to arouse certain reasonable expectations in another person (B), then if B alters his position in reliance on such reasonable expectation in a way which will be detrimental to his interest if the expectation is not fulfilled, A may be required at B's insistence to do whatever is required to fulfil that expectation. But the interest of B which is to be protected is regarded by equity courts as worthy of protection only if it is economic interest. The rights which emerge from such protection are characterised by some expectation of pecuniary loss or profit. What is relevant is not the existence of some corporeal object but some conception of the mind to which is attached pecuniary value. Thus the process of this development marks the translation of the concept of property from that of exclusionary right over physical things to that of the protection of rights which have economic value. Personal duties or obligations involving these expectations were termed property.²¹ The conception of property developed by equity courts was fully incorporeal. As Commons states:

21. Scott, A.W., Law of Trust, vol. ii, Boston 1956, p. 10.

Property has become intangible and incorporeal; liberty has become intangible property; duties are incorporeal property; each is the expected beneficial behavior of others in dealing with self, and the present value to self of that expected behavior is capital or asset. ²²

In cases where courts see no right which is violated, they refuse to grant relief. This is a general principle since by granting relief courts will create new rights for the future. But equity courts did not set much store by this principle and tried to advance remedies in personal matters on the basis of expectations. They took moral or ethical rights, arising from activities, involving expectations of profit or loss, and transformed them into legal obligations of ownership. Trust is one of the examples through which we can trace and formulate a general theory of ownership applied by equity judges to substitute proprietary interests for personal obligations. How did this new concept of property become workable in the practical aspect of life? This development through the equity judges provided a new basis for the development of the Anglo American lawyers' conception of property.

In the beginning trust was considered a personal relation between the trustee and the beneficiary, the beneficiary's interest was no more than a claim against the trustee. The reason being that the origin of uses is based on the avoidance of feudal burdens which were personal obligations by the tenant to his landlord. This personal character of the relationship of lord to tenant was transplanted into the relation between trustee and beneficiary (though the feudal obligations were not wholly found in the case of trust, only the personal character was there).

22. Commons, J.R., Legal Foundations of Capitalism, London 1968, p. 28.

The equity judges transformed this personal relation by imposing duties on the holder of the legal title. This created a proprietary interest of the beneficiary in the trust property. By creating an encumbrance the trustee's personal duty became corresponding to his right to use property only for the benefit of the beneficiary. The interest of the beneficiary thus became a property interest.²³

Because of the confidence placed in the trustee by the feoffer, the trustee is bound as a matter of conscience to perform the duties which he has undertaken. The equity judges are compelling the trustee under the pain of conscience to do what is entrusted on him rather than deciding what sort of an interest the beneficiary might have. The reasons for doing so were the exigencies of the situation which required them to proceed on the theory that they were simply compelling a person to do what conscience demanded. In this way equity was giving the beneficiary all that was his interest under the guise of a burden of conscience. Personal relations were transformed into property relations and thus there evolved a new system of property. The primitive notion of property as an exclusive holding of things for one's use was being replaced by the control of behaviour of other persons where it led to economic advantages or pecuniary considerations. Personal relations with pecuniary considerations gained the status of property relations.

23. Scott states that in the beginning the relief to the beneficiary in the case of sale of his interest by the trustee is based on the ground of interference with the personal relation between the trustee and the beneficiary rather than on the recognition of the proprietary interest of the beneficiary.

The Law of Trust, vol. ii, p. 962.

Maitland, Selected Essays, London 1936, p. 166.

For example, the fiduciary relations between persons leading to economic advantages became property relations, their protection, their implementation, etc. became proprietary rights as in the case of trust. In the context of a money economy the personal relations of master and servant were replaced by property relations because services could be converted into money price. Thus it is the control over the behaviour of others due to its pecuniary value that made it a property relation. The value does not reside in things but in the expected transactions relating to things. This whole range of what Commons calls 'behaviouristic values' distinguished from physical things were converted into property.²⁴

An essential step in the development was the process whereby the interest of the beneficiary came to extend against others generally. His interest came to be protected not only against the trustee but against others who were restrained from interfering with his interest even when his interest was in the hands of the trustee. Any interference by a person who has notice of the trust is remediable at the instance of the beneficiary against any such third party as well as the trustee. An interference by a bona fide purchaser for value without notice of his interest in the trust property cuts off his interest in trust property; but that merely means the extinction of his real right in trust property and not that he did not originally have an interest against others in general. The incidents of legal ownership have been fully recognised in the case of the beneficiary's interest. The rights exist prior to their breach

24. Commons, *op.cit.*, p. 235.

and we cannot argue that they exist only when their breach occurs. So it is said that the beneficiary had right against the transferee who took with notice or without notice but had no right against a bona fide purchaser; he still had a right in rem in the sense of right available against others generally. If a person does not have a right in rem unless he can enforce it against all persons and under all circumstances, then even the legal owner of property may not have rights in rem as in certain cases his right is not available at certain times against certain persons. As Honoré explains:

A right may be such that it is immune from divesting in general, but is liable to be divested by some special form of alienation. An equitable "interest" in the capital of a trust is liable to be divested upon alienation of the trust assets to a bona fide purchaser for value...

The owner's rights are, in general, immune from divesting without his consent. Certainly most systems of law acknowledge some exceptions to this principle. Sometimes sale in market overt, or sale by a factor or sale by a bailee divests ownership. Immunity remains the general rule, but it is substantially an immunity against divesting by purported alienation of the property, while the immunity of holders of lesser interests²⁵ is an immunity against divesting by actual alienation.

There are thus degrees of immunity against involuntary divesting of rights over the res. And Professor Honoré, keeping in view these degrees of immunity, says that one can speak of "weak" and "strong" real rights or interests in property,²⁶ but this does not affect the rights in rem.

The interest of the beneficiary if he dies intestate will descend

25. Honoré, A.M., "Rights of Exclusion and Immunities against Divesting", Tul.L.R., 1960, pp. 466-467.

26. Ibid, p. 466.

in the same way in which the legal interest would descend. The results of succession both in case of equitable and legal ownership are the same. The heir of the beneficiary takes the property interest not as representative but as heir. Various interests can be created on the trust as in the case of legal ownership. Thus a new system of ownership was created which in many respects is similar to legal ownership yet different from it. The result is something unique, a double form of ownership. Down beneath is the trustee who holds the legal title, above him is the beneficiary who has an equitable ownership.²⁷ This is as if the legal owner had the bag and the equitable owner the substance. As Commons puts it:

We must distinguish between titles of ownership and substance of ownership. If I own a piece of property and somebody else owns the net income from that property, I hold the bag and he takes the substance.²⁸

Substance includes the duty of the trustee toward the trust property so as to produce benefit for the beneficiary.²⁹ So there is no difficulty in saying that the trustee has the legal title to the subject-matter of the

27. Professor Ames insists that it is inaccurate to say that the beneficiary is the equitable owner of the trust property because the trustee is the owner, and of course two persons with adverse interests cannot be owners of the same thing.

Lectures on Legal History, London 1913, p. 262.

Maitland, F.W., Equity, A Course of Lectures, London 1936, Lecture iv.

Salmond, however, does not agree with them and recognises equitable ownership. Jurisprudence, London 1947, p. 278.

28. Commons, op.cit., p. 169.

29. The idea of trust has much contributed to the development of incorporeal property. Modern industry has developed on this idea. The shares are evidence not of ownership of the physical property, but of residual income. The shares are encumbrances on which itself as a 'corporate person' owns the physical assets.

trust and that the beneficiary has an equitable ownership of it. The two types of ownership are necessarily parallel and therefore can co-exist simultaneously.

The equity judges enlarged the idea of property by means of the change in the working rules from that of ownership of corporeal objects to that of incorporeal objects, not identical with the corporeal objects but having almost total identity in form and content. Thus acts and transactions made between different persons affecting their future conduct involving pecuniary considerations were regarded as property. Property became acts and activities involving pecuniary values. This relationship may be actual or intended. This enlargement from material objects to acts and activities of pecuniary value made future acts and activities a form of present property. For example, the promise to do or abstain from doing an act involving pecuniary considerations is the present property as in the case of good-will. This is the present property interest in the future economic advantage, and this can be sold and bought as a present property interest. The emergence of this new conception of property as including both corporeal and incorporeal things is geared towards the market economy as it facilitates economic transactions.³⁰ The modern conception of property is, thus,

30. Professor Lawson states:

The reason why the property lawyer turns all these rights and interests into things, however abstract they may be, is that since they have value, people are willing to buy them; and any value asset which is the object of commerce is properly treated as a thing, just as much if it is an abstraction such as a share in a company as if it is a physical object such as a ship or a motor-car. The main reason why far more attention is devoted to abstractions than to physical objects is that, since they are creations
(see over)

explained in terms of economic acts and activities, or, in short we can explain more fully in behaviouristic terms. As Commons states:

The behavior is the expected transactions on commodity markets and money markets. It is not corporeal property, but is incorporeal and intangible property. Its name is "assets", the exchange values of things, and assets are the expected additions to income to be derived, not from physical things, but from expected profitable transactions with persons who are not owned.³¹

As a result, property comes more than ever before in modern times to be primarily a source of economic power to an even greater extent than previously. The notion of property, as an expression of self, to control and use to fulfil needs of individuals was left in the back-ground during the course of the development of property.

The equity judges, thus, in transforming personal relations into property relations in effect elaborated an implicit theory of pecuniary value arising out of transactions of man with man as the criterion of what constituted a 'thing' capable of being owned. Their judicial analysis led them to believe that behind the primitive notion of property lies the reality not in physical things but in individual expectations arising from promises or otherwise. Their second premise in concluding the pecuniary theory of property lies in the answer they gave to the question,

30. (Continued from previous page)
of the human mind, they can be made to conform to patterns consciously chosen for their practical utility and capacity for combination with each other. These patterns and combinations can be made the objects of a calculus which is a fit subject of study by lawyers. In comparison with them natural objects such as land or animals are too individual to serve as mathematical units of this kind.

Introduction to the Law of Property, Oxford 1958, p. 16.

31. Commons, op.cit., p. 168.

why did society permit or favour the development of private property? And it seems certain that they found the answer in economic contents of property. And since the security of such expectations is of high importance in a market economy they came to be regarded as property having pecuniary value. Thus these personal relations turned into property relations. It is the 'behaviouristic' conception of property, developed principally by equity judges, that transformed personal relations into proprietary relations. Equity, thus, worked out a system of jural relations of economic advantage. A striking example is found in the case³² in which the equity court issued an injunction to restrict the recipient of a private letter from publishing information therein contained regarding an estate of the sender. Relief could not possibly have been given on the basis of an orthodox property interest. The estate had no possession of the paper on which words were written. Any interest in the non-publication of the letter had none of the characteristics of tangible property. The relief was granted on the basis of the breach of confidence which might prejudice the estate by the disclosure of the information. So the concept of property was extended to the written information about the estate. Professor Commons explains this by the peculiar faculty of the equity courts to command specific behaviour by issues of writs and injunctions in order to create those intangible property rights of modern business which have made the transition from physical property to intangible property. "By means of injunction the court can, in advance, enter into the most minute detail of behavior needed to recognise new rights and protect new definitions

32. Gee v. Pritchard (1818) 2 Swan. 402.

of ... property ... Equity looks on property as behavior claimed of other persons."³³

This 'behaviouristic' theory was applied to human acts and activities and where it fitted, the acts and activities were termed property. The old conception of property as being confined to such objects as land was thus extended into the field of behaviouristic acts and relief was given solely on the ground of human acts involving pecuniary considerations. For example, in case of trademarks a man has no independent property interest as in the case of land. He has it as appurtenant to a business he is carrying on. The real basis of giving relief in case of trade marks is to prevent fraud, unfair competition, etc. so as to avoid unjust enrichment at the expense of trade mark holders. The economic considerations were undoubtedly the basis in deciding these points. As Commons explains:

The transition from concepts of physical things to concepts of business assets, could not be fully completed until the idea of ownership was shifted from the holding of physical things to the³⁴ expectations of profit from the transactions of business.

If economic considerations were supposed not to have been the basis of equity relief, but purely conscience, it would be impossible to explain the class of expectations protected by equity as contrasted with those not so protected. It is this activity of the equity courts in case of trusts³⁵ and in transforming corporeal property into incorporeal

33. Commons, op.cit., p. 234.

34. Commons, op.cit., p. 274.

35. Nussbaum, A., "Sociological and Comparative Aspects of the Trust", Col.L.R., 1938, p. 410.

property which is the strength and dynamic force in the rise of capitalism.³⁶

To have given relief on the basis only of breach of confidence or breach of fiduciary relations would have prompted the courts to give relief in such cases where any interest of personality is involved, as in love matters. So either one must regard all interests as property or develop a criterion to differentiate proprietary interests from purely personal interests. The equity judges for the sake of distinction attached the insignia of pecuniary considerations to personal-property interests.³⁷

Similarly in the case of good-will, the 'behaviouristic' theory involving pecuniary considerations was applied.³⁸ In case of intangible things, they are protected processes which exist as objects of property, entirely separate from the material objects, having no immediate or ultimate relation to particular material objects. They are by their nature separable from particular material objects. The courts have constructed the concept of good-will on the approved and disapproved transactions of a business concern when they found it commercially valueable and not before.³⁹ The nature of good-will is realised not in the material objects of the firm or business, but is separate and independent of them, hence it is an intangible asset. A business has

36. Commons, op.cit., p. 235.

37. Salmond regards money value the distinguishing mark between property rights and personal rights. Jurisprudence, London 1947, p. 257.

38. Copyright is another example of intangible property which represents a shift in the meaning of property from physical things to expectations of profit to the author. The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. Chafee, Z., Jr., "Reflections on the Law of Copyright", Col. L.R. 1945, p. 507.

39. Pollock, op.cit., p. 134.

a good-will because of the approved services, good dispositions, which customers entertain towards it and because they identify it by a particular name. Good-will represents a mixture of the equity principle of good-faith coupled with pecuniary value as a principle in recognising economic contents of intangible property. As Commons says:

[An] engineering economy, while it produces commodities, does not of itself produce confidence in the commodities. This springs from honesty and good service. [For] production of wealth ... Ethics is the field of production of that invisible utility, confidence, without which the tangible utilities are not even produced. The use-value of ethics is confidence in others, and the exchange-value of ethics is the market value of their good-will.⁴⁰

The courts protect good-will to secure confidence in the business concerns by protecting them against fraud and unfair competition. Because of the earning value of good-will, it has a market value. When the good-will of a business concern is sold along with the business, law compels the seller so to conduct himself that none of what he has sold stays with him. The seller may not trespass upon the 'good-will' transferred by himself, continuing in the same business in the same locality (and no one else may pass himself off as trading under the same name). The restrictions on the competition are not general, even after consideration has been paid for the restrictions imposed on the seller, but particular, for the law will strike down a bargain which unreasonably restrains anyone from practising his trade. In the case of good-will these restrictions are limited to places and persons. The sale by the seller is of an incident of his property, not of his personal liberty, as Commons argues.⁴¹ Noyes says:

40. Commons, op.cit., p. 206.

41. Ibid, pp. 267-268.

Legally, goodwill is the persona, or personality, of a business. It is that which is injured by any infringement on its exclusive identity - by "unfair competition". So far as a purely legal analysis is capable of arriving at the nature of the quasi-material object in this case, it is this individuality.⁴²

The objects of property thus owned or protected are merely beneficial transactions. By protecting this mutually beneficial expectancy and giving to it the attribute of negotiability the law converts a valueless personal right into a valuable property right - valuable precisely because the law has rendered it capable of exclusive exercise and inter personal transfer.

These are examples which show how the institution of property developed from corporeal property to incorporeal property and resulted in a pecuniary definition of proprietary interests. The idea of property as an expression of a human- self, one's personality, and fulfilling one's needs both spiritual and material, was lost during the course of development from the infancy of society to its present form of property in most civilised countries. The economic power developed through the incorporeal property severely curtailed the property rights of individuals affecting both their personality and their ownership.⁴³ The property enjoyed by people both with respect to objects and rights is less than a century ago because the subjective factors found in the notion of property are absent though objectively property has reached

42. Noyes, C.R., The Institution of Property, London 1936, p. 450.

43. Limitations on the institution of property are not only the result of increase in the objects of property and their proper distribution to maintain economic equilibrium, but also increase of economic power through these incorporeal rights in the hands of the individual.

considerable heights. The development of the institution of property as to include acts and activities having pecuniary value has affected both writers of jurisprudence and the practice of the courts. As civilisation became complex, the realisation was forced on the courts that business privileges and transactions are things of value because men are willing to pay for them, and therefore, the courts adjusted themselves to treat these activities as assets. In general the courts seem to define as property at law whatever is treated as property in the economic life of the time.⁴⁴ This forced the institution of property into the domain of economics.⁴⁵ In fact both law and economics are inseparable and are necessary for social order. But in this juxtaposition, the practical discipline of economics fully submerged the spiritual element of the institution of property. Non-material contents of property have been ignored; the idea of personal liberty disappeared. Any right to earn property itself became property because of the pecuniary insignia attached to it. Again in case of shares, the subjective element of control in one's hands to use one's own property is replaced by corporate control. This is the end product of the development of the institution of property and its transference in pecuniary terms. Again the introduction of the idea of exchange value (acquisition and disposition) rendered certain personal creations such as ideas unworthy of the concept of property and thus of protection.

44. Noyes, *op.cit.*, p. 411.

45. Under certain legal systems the right of property has been termed as economic rights.
 Kruse, V., The Right of Property, trans. by Federspiel, P.T., vol. i, p. 130.

Increasing influence of economic theory on jurisprudence is clearly evident in the development of the institution of property.

Juristic writers and courts both lay great stress on pecuniary values in distinguishing property rights. The touch stone or insignia which became necessary to identify and protect property interest is pecuniary value. The writers of jurisprudence concede or attach considerable importance to this criterion. As Salmond states:

The aggregate of a man's proprietary rights constitutes his estate, his assets, or his property in one of the many senses of that most equivocal of legal terms ... The sum total of a man's personal rights, on the other hand, constitutes his status or personal conditions, as opposed to his estate. If he owns land, or chattels, or patent rights, or the goodwill of a business, or shares in a company, or if debts are owing to him, all these rights pertain to his estate. But if he is a free man and a citizen, a husband and a father, the rights which he has as such pertain to his status or standing in the law.

What, then, is the essential nature of this distinction? It lies in the fact that proprietary rights are valuable, and personal rights are not. The former are those which are worth money; the latter are those that are worth none. The former are the elements of a man's⁴⁶ wealth; the latter are merely elements in his well-being.

Hence land, or chattels, or patent rights, or the goodwill of a business, or shares in a company, or of debts owed, etc. are property. But such rights that are of immense value to a man as citizenship are not property because they have no money value. Hence they are worth none, since they refer to status and not to property. But Salmond could not make it clear how rights such as citizenship are not as valuable as proprietary rights. In Roman law there were many restrictions on non-citizens in acquiring property, while citizens were free from these

46. Salmond, Jurisprudence, London 1947, pp. 256-257.

restrictions. Citizenship was more valuable than proprietary rights, of immense value for human life, a part of one's personality, which enables him to acquire property. Thus it cannot be said that it was worth nothing. In fact Salmond could not make the distinction clear merely by applying a monetary criterion. Moreover he states that the term status can be used in many senses, and one of the senses in which he used the term status is this:

Legal condition of any kind, whether personal or proprietary ... A man's status in this sense includes his whole position in the law - the sum total of his legal rights, duties, liabilities, or other legal relations, whether proprietary or personal⁴⁷, or any particular group of them separately considered.

The explanation which Salmond offers for this confusion is that the above is the most comprehensive use of the term 'status',⁴⁸ but the mere fact that status includes both personal and proprietary rights is enough to show that the idea of property as merely money value, though simple and easy, is an insufficient criterion as a characteristic of property rights. The monetary tag on property rights, however perfect and simple it may be, fails to make conspicuous the very idea of property as a reflection of human sentiments in terms of man's psychological, philosophical and moral aspirations. As Amos states:

It is not material wants, hopes, desires, and tendencies alone to which ownership lends its aid as a potent instrument of satisfaction and even development. The moral aspirations and needs of individual men are scarcely less signally sustained and gratified by ownership⁴⁹ than the material.

47. Ibid, p. 259.

48. Ibid

49. Amos, S., The Science of Law, London 1874, p. 155.

A similar view is expressed by Lawson when he uses the pecuniary insignia to make clear the distinction between property rights and personal rights, and thus states:

The object of the law of property is to provide a secure foundation, so far as the law can do it, for the acquisition, enjoyment, and disposal of wealth. For this reason it is, in contrast to the law of persons, and especially of family law, the part of the law most closely allied to economics.

It might therefore be expected to cover the whole field of economics, and in particular not only real relations, including relations protected against persons having notice of them, but at least some personal relations. For a man may have many claims on other persons, arising from contract or otherwise, which add materially to his wealth. He may be entitled to be retained in an office or employment. If so, he is clearly the richer for it; if he can alienate that right and turn it into money by substituting some other person in his office or employment, the office or employment is still more clearly part of his wealth.⁵⁰

So is the view of Vinogradoff,⁵¹ Goodhart,⁵² and Anson.⁵³

50. Lawson, F.H., Introduction to the Law of Property, Oxford 1958, pp. 2-3.

51. Vinogradoff states:

In so far as objects of right may be regarded as possessing marketable value they are called 'property'. Not every object of right admits of such an estimate; a person's honour or reputation, for instance, cannot be appraised either for consumption or for sale, although heavy damages may be awarded for a wanton or malicious attack on it. On the other hand not only concrete things like estates, houses, furniture, but also abstract things, such as the goodwill of a firm or the copyright of a novel, have a value in the market and therefore form items of property.

Common Sense in Law, London 1946, pp. 62-63.

52. Goodhart, A.L., Essays in Jurisprudence and Common Law, Cambridge 1931, p. 41.

53. Anson states:

The matter of the obligation, the thing to be done or forborne, must possess, at least in the eyes of the law, a pecuniary value, otherwise it would be hard to distinguish legal from moral and social relations.

Principles of the English Law of Contract, Oxford 1910, p. 7.

Criticism of monetary criterion as a basis of ownership

Though such wide meanings as are being attached to the concept of property help in enriching and widening the scope of the concept, yet it will take the concept out of its original limits and create a confusion because of the illogicality and danger manifested in such an approach. To clothe the concept of property in such shaded clothes will destroy it from within. The concept of property will go out of the domain of jurisprudence and become subject to the shifting tide of fashion in economic theory. This is reducing property to mere pecuniary benefit and making the dictum "money makes the mare go" a jurisprudential maxim. With the development of market economy (capitalism), this error of interpreting rights of property as merely pecuniary value has reached its heights and is presented as an exhaustive definition of the concept of property (including within it all types of rights which can be exercised in earning money).

The illogicality and danger of such an approach is recognised by Kruse. Professor Kruse gives a sketch of the economic development of the institution of property and states:

It was only when practical conditions changed, when the economic development assumed new and greater dimensions, when world trade gradually came into existence through the discoveries, and big industry through the inventions, and the mental and spiritual qualities were changed accordingly, that the earlier legal forms lost contact with the period.⁵⁴

In its inception, the institution of property started with the allocation of control over things necessary to satisfy human needs. Even in

54. Kruse, op.cit., vol. i, p. 74.

modern times this remains the chief and main task of the institution of property. These objects of property at a later state of development are called economic goods and find their way into legal ideas. Property in modern laws becomes purely concerned with economic rights. As shown above it is now emphasised both in legal text books and courts that the right of property must be of economic value. Kruse points out that the materialistic view point of different social philosophies imprinted on the institution of property the stigma of economic value and alienated it from its subjective contents. He states:

The materialistic views of the different social schools have naturally exerted an influence also on legal thought of to-day ... we must bear in mind the enormous influence of Roman law which knew only the material property rights. ⁵⁵

The emergence of new property rights ⁵⁶ like copyright is protected on economic grounds but deep in the mind of the author, into which law does not peep, lies the non-materialistic value of immense importance to the author, the subjective satisfaction in his intellectual production, for which he claims it as his property. Similarly in case of easements, the convenience and justification, they afford in providing human life a comfortable living, themselves support the non-materialistic values found in the institution of property. No rights are regarded as absolute in the sense of overriding public interest. Social interests always stand between man and his rights. No line can be drawn between rights and public interests, as it is visible from their role in social order that

55. Ibid, p. 129.

56. Olson, H.R., Jr., discusses the emergence of property rights in ideas in his article, "Dreams for Sale, Some Observations on the Law of Idea Submissions and problems arising therefrom", Law and Contemporary Problems, 1958, p. 34.

rights are nothing but products of social interests in one form or the other. It is not materialistic values embodied in rights but it is the social spirit of those rights that prevail. As Kruse states:

There are a number of rights which, though to some extent differ in detail, all have this essential quality in common, that they do not apply to external, material objects, but to internal, spiritual, or rather intellectual values or products.⁵⁷

Trespass on land adjoining a highway is justified if the highway is impassable due to floods. Similarly in case of a house on fire, entering the house to help without prior permission of the owner of the house is justified. Limitations on the rights of property arose out of those values of life which find no substitute or parallel in material goods. Our factory legislation and social welfare schemes arise out of those spiritual values which are the basis of the institution of property. These limitations and schemes represent not only the economic values but the other side of life to which Kruse calls 'spiritual value of property'. Kruse is, therefore, opposed to the criterion of money value for determining property. He states:

In the text-books of property law it is emphasized that the physical objects or things to which the right of property, the right of use, the mortgage rights, &c., apply must be of economic value or barter value, in other words, fit to satisfy common human economic requirements. Sometimes, however, it is asserted that one particular right, the right of retention, a right for A to remain in possession of B's thing until B has fulfilled an obligation, especially performed a payment, need not apply to a thing of pecuniary value, but, for instance, to letters of no such value, just as it is occasionally pointed out that the owner must have a right to vindicate or recover a thing even if it is of no economic value.⁵⁸

57. Kruse, op.cit., vol. i, p. 75.

58. Kruse, op.cit., vol. i, p. 129.

He further states:

Not only the rights to intellectual production must be regarded as property rights, and may not be considered solely as a sanction protecting the economic interests of the intellectual producer ... but in large fields of human life the actual right of property in external material objects satisfies also certain non-material needs and are even based thereon. This is true not only of the immediate right of property, but to my mind a new sphere of law has developed unconsciously within the legal form of easements to satisfy interests which are not essentially economic but serve also other sides of life. To define the property rights as economic rights is to-day no longer true to real conditions.⁵⁹ A new reality of a spiritual nature is coming into being.

Essentially the subjective nature of property is the essence of the institution of property.⁶⁰

"In so far as objects of rights may be regarded as possessing marketable value they are called 'property'" says Vinogradoff.⁶¹ The courts take this view as a settled characteristic of property.⁶² Some statutes have gone to the length of substituting the words 'economic rights'⁶³ for property rights. This indicates a growing tendency to substitute economic rights for property rights, and the time might come when we find only economic rights and no property rights and lose whatever solace we find in the idealistic side of property, in the words meum and tuum.

Justice Holmes remarks that "property, a creature of law does

59. Ibid.

60. Bowen, E., "The Concept of Private Property", Cor. L.R., 1925, p. 41.

61. Vinogradoff, op.cit., p. 62.

62. Noyes, op.cit., p. 411.

63. Kruse, op.cit., Vol. I, p. 130.

not arise from value, although exchange values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference."⁶⁴ So is the view of Justice Brandeis.⁶⁵ But one should not conclude that the 'value concept' is not an essential part of property, though one can dispense with the 'economic value concept' as an essential part of property. Property is any valuable interest or right. But it is wrong to pinpoint this right or interest in economic (especially market) values alone. Sometimes a right or interest may have an immense value because of sentimental or other attachments without having any economic value. One idea of Austin⁶⁶ with regard to the institution of property implies the use of right in the widest possible sense, viz, any legal right.⁶⁷ Such use of the word 'right' will alleviate the economic character as a primary character of property, though it will transgress the distinction between property rights and personal rights. But we can avoid this difficulty if we insist on property as concerning rights over 'things', and admit within the category of 'things' whatever is considered essential to human life or to the maintenance of human personality. For example, a hockey player⁶⁸

64. International News Service v. The Associated Press, (1918) 248 U.S. 215.

65. Ibid.

66. Austin, Jurisprudence, vol. ii, London 1873, pp. 819-220.

67. Salmond, however, is against such an idea and says:

In its widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that is his in law. This usage, however, is obsolete at the present day, though it is common enough in the older books.

Salmond, Jurisprudence, p. 423.

68. Rowe, v. Hewitt, op.cit.

who has been refused a certificate to play in a match is deprived of his property because of his personality being affected through loss of the opportunity to exercise his skill as a player.

The courts are also inclined to take the view that those things that are essential to a man's career are his property. An admission card to sit in an examination has been considered property by the court (in India) which states:

Though the admission card as such has no pecuniary value it has immense value to the candidate for the examination. Without it he cannot secure admission to the examination hall and consequently cannot appear at the examination.⁶⁹

Indeed the very idea of property has often been used as a means of demarcating the sphere of human activity. Ihering says:

In making it my own, I stamp it with the mark of my own person, whoever attacks it, attacks me, the blow dealt it strikes me, for I am present in it. Property is but the periphery of my person extended to things.⁷⁰

Property is a part of the self. Hegel says, "Property is the embodiment of personality."⁷¹ A similar view is expressed by Kruse when he states:

As far as your activities reach and have effect, so far the world is yours, but no farther.⁷² This is an ideal of justice common to all property.

This subjective element in the institution of property and the use of an economic measure is justified only as a more or less objective criterion

69. Abhaynand Misra v. State of Bihar, AIR 1961, S.C. 1698.

70. Ihering, Struggle for Law, trans, Lalor, J.J., Chicago 1879, p. 55.

71. Hegel, Philosophy of Right, trans. Knox, T.M., Oxford 1971, p. 45.

72. Kruse, op.cit., vol. ii, p. 76.

for establishing 'value' especially when the subjective element is far removed from an individual self. But in cases where the subjective criterion, as in the case of the admission card, of ideas, or of the certificate to play hockey, can be directly applied, there is no need to refer to the 'objective' criterion of exchange value, and no justification for refusing to grant proprietary protection. The subjective criterion ought to be the basis of the institution of property and economic criterion should serve only as supplement. The idea is not to discard the old framework within which the concept of property works⁷³ but to see it for what it is, as a part, not the whole, of what is essential to a conception of property as dealing with all the essentials of human existence. New realities are emerging⁷⁴ and they cannot be recognised under the old standards. This is like putting new wines in old bottles. The rejection of new realities, on the basis of the absence of pre-existing legal pegs, would frustrate social aspirations. Take the case of property in ideas; their proprietary character at present is denied because they do not satisfy the 'exchange value' criterion of property. But if an idea is concrete and contains a plan, it is protected irrespective of any contract or good faith on the part of the discloser. Again if the idea is abstract but there is a binding contract between the parties,

73. Dennis Lloyd while realising the insufficiency of old criterion of property states:

All I desire to rebut is the attempt, so to speak, to distil the development of the law out of a fixed framework of concepts, so that these become the masters rather than the servants of the argument. "The Recognition of New Rights", C.L.P., 1961, p. 42.

74. Ibid, pp. 39-57.
Olson, op.cit., p. 34.

that is discloser and disclosee, the idea is protected. But even here, it is the contract that is protected not the idea. But if the idea itself is to be protected, then on what grounds? It is not 'property' like the concrete ideas which receive protection under copyright or patent law. Is one to conclude that an abstract idea becomes property as soon as contract is entered between the parties for its protection? If that is so, then when an abstract idea is revealed by one party to another, no property is created in the absence of a contract. Referring to this anomalous position Turner states:

To say that a novel abstract idea is only protectable by an express contract, is tantamount to saying that an abstract idea is no more protectable than a practically worthless unoriginal idea, because the latter is protectable by express contract, if the disclosee chooses so to bind himself. Thus under this doctrine if an idea is held to be "abstract" however novel and valuable it may be, the circumstances of its novelty and value will not be permitted to help give rise to an implication of confidence.

Under the present law, what makes an idea 'property' is the circumstances which put value on the idea, not the intrinsic value of the idea. It is the external circumstances that constitute property, not the expression of the self which is the origin and source of all values; and thus despite the fact that rights, as such, do not only or necessarily refer to material and external objects, but also to the internal and intellectual values and products. In these conditions, it becomes essential to determine whether a thing is property in itself or only due to its economic worth. My submission is that 'things' can and should be included within property not on the grounds of their mere economic

75. Turner, A.E., The Law of Trade Secrets, London 1962, p. 385.

contents but because of the value, economic or non-economic, we attach to them. Property is a right. The only quality of this right is its exclusive nature. The only value we attach to this exclusive right is our subjective expressions. As Kruse expresses:

Here, and only here, is the property of the individual, spiritual or material, a circle, great or small, but a circle which is his, because he has created it, a world for which the community may fix certain rules for the sake of other circles, but an orbit whose essence no community can violate with impunity, for then the kindled fires of this society will be extinguished.⁷⁶

Thus things are property independent of their economic contents, for it is not the thing but the right over the thing that determines property. Thus an idea can practically be treated as an object of property in its own right. Any breach or violation of a property right in an idea, should be judged in terms of its practical utility as a trade secret not in terms of what the idea will fetch in the market place. Moreover in case of an idea being regarded as property, its breach or violation will involve an element of good faith in securing proprietary relief. Breach of confidence in itself will not be a ground of action unless it is related to something. If it is granted that there is property in ideas (subjective elements irrespective of economic contents) the anomalous position presented by the traditional criterion of property will be avoided.

The emergence of new rights and the decay of old ones through abrogation and modification of existing rights, is not a new phenomenon for the institution of property.⁷⁷ Alterations and modifications,

76. Kruse, op.cit., vol. i, p. 76.

77. Austin, op.cit., vol. ii, pp. 819-820.

definitions and redefinitions, of rights of property are an ever present process, and there is no end to it as there is no end of intellectual production.⁷⁸ It is no exaggeration to say that the institution of property in terms of its stability is always at stake. But at each stage of its development the subjective element in it is pressing itself with more vigour. Such a recognition finds support in the minority judgement of Malins, V.C., when he says:

I am told that a court of equity has no jurisdiction in such a case as this, though it is admitted it has jurisdiction where property is likely to be affected. What is property? One man has property in lands, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion,⁷⁹ destroying property of a most valuable description.

A similar view has been expressed by Vaisey J. when he remarks:

If a man, be he musician, portrait painter or writer of articles in newspapers, gets to be known under a particular name, that name becomes inevitably part of his stock-in-trade, and apart from some special contract or anything of that kind, he is entitled to say that it is his name, and that anyone who adopts or causes the adoption of that name by some other person is inflicting on him an injury.⁸⁰

78. Philbrick, F.S. says:

Each recognition of a new thing as the object of legal rights has opened a new chapter in the law, often one of vast complexity. But even as regards things recognised for seven centuries as property, the rights in them recognised by law have been forever changing. Of inconceivable importance has been the slow development, in relation to different types of property ... instances of new rights thus recognised, and of old rights that have decayed or totally disappeared, might be given in great numbers.

"Changing Conceptions of Property in Law", Un.Pen.L.R., 1938, p. 692.

79. Dixon v. Holden, (1869), L.R. 7 Eq.Cas.488. Quoted in Robinette, J.J., "Protection of Property Interests in Equity", Can.B.R., 1932, p. 176.

80. Hines v. Winnick, (1947) Ch.708. Quoted in Lloyd, D., "The Recognition of New Rights", C.L.P. 1961, p. 46.

"Objects of property in the economic sense have increased enormously but property is an essentially subjective matter; the concept of property has constantly decreased."⁸¹ The great confusion in the present day ideas of property is due to the neglect of this subjective element. If its importance is restored and realised, the right of property would not fail to solve problems raised by the idea of a property right in a voice⁸² or in ideas.⁸³ By sticking to the old framework in its traditional manner, the contemporary law is on the wrong track and has therefore reached a deadlock in dealing with certain social problems. Socially the most important field for human existence is man's relation with the surroundings and all that belongs to it. The strong personal element in this relation to the things, may be of economic or non-economic nature, but their protection should find its true and natural expression in law. My purpose is neither to expect nor to desire a definite meaning of property as to its finality but to show that the property criterion at the present time is proving inadequate to grasp the social values. The old framework needs re-examination under the pressure of new realities. This is to plead for a better and more candid recognition of juristic forms of development. This is not to reject the practical value for many purposes of the economic concept of property but to give it a secondary role. Exchange values are not the primary facts but are secondary consequences which legal systems have adopted as unanalysed expressions of primary facts.

81. Bowen, E., "The concept of Private Property", *Cor. L.Q.* 1925, p. 43.

82. Lloyd, D., *op.cit.*, p. 39.

83. Olson, H.R., Jr., *op.cit.*, p. 34.
 Winfield, *Tort*, London 1971, pp. 483-485.
 Turner, A.E., *op.cit.*, pp. 382-386.

CHAPTER IV

JUSTIFICATION OF PRIVATE PROPERTY

The institution of property is a means of securing to individuals control over things. It gives the individual control over things and their disposal within the given legal system. The existence of an institution of property in some form is morally and socially justified by the fact that the existence of human life would be impossible without it because (or to the extent that) it is the means for securing to people the means for living. Human control over things is essential to human life. But the equal need of all human beings for control over the means of their subsistence has never determined the principles on which the distribution of property has been based. The laws of property have made property of things which never ought to be property, and absolute property where only a qualified property ought to exist. They have not held the balance fairly between human beings, but have heaped impediments upon some, to give advantage to others. A system of property as such does not guarantee any particular distribution of assets among individuals. As is obvious, some may have excessive property holdings, some moderate holdings, and some - often the great majority - none of any significance. It is the positive provisions of the law of property which establish or secure a particular distribution of property. The laws concerning distribution of property are not of uniform nature but change from time to time in accordance with political and social changes. When the landed gentry wielded political power in mediaeval times, all forms of property other than the land were looked down upon and kept at

a social disadvantage. As Pollock states:

In the first half of the tenth century this is fixed as a positive rule, and the landless man must find a lord at his peril. If he or his kindred for him fail to do this, he becomes outlawed, and may be dealt as a robber.

With the advent of industrialisation, the landed gentry lost effective political power and the urban industrialised class made property laws to their advantage. The laws of property struck at a class whose political power was weak. Since those in the majority were politically weak, it is round them that the battle of laws of property rages. Similarly classical writers struck against usurers who did not belong to the industrialist class, and lacked any effectual power to introduce factory legislations. All theories concerning the justification or criticism of property have to be seen as arguments in favour of or against some given distribution of property, rather than the actual existence of the institution itself.

The oldest and until recently the most influential justifications of the institution of property were based on such grounds as the occupation theory, the social contract theory, labour theory, and the theory of promoting security of possession to encourage accumulation of wealth, and so forth. These theories dominate much thinking from the times of the Roman jurists to the modern philosophers; so much so that the first three theories, though offered at different times by different thinkers, ultimately ended on the common ground that labour has a right to occupy the material that is fashioned by labour into the finished

1. Pollock, The Land Laws, London 1896, p. 31.

product. The last of the theories - promoting security of possession to encourage accumulation of wealth - is drawn from the belief that individuals are basically selfish and will work hard if they are secured in their possessions. In fact this theory is a corollary of the labour theory but its justification of labour is not based on occupation or social contract theories but on ideas of economic productivity. But whatever be the basis for all these theories, the fundamental idea that lurked in the mind of all those philosophers who propounded these theories was to justify the existing social systems with unequal distribution of wealth. They all feared the unstable situation that might arise from any radical change of the existing social system. Although the grounds for expounding these theories and sustaining the existing order of societies were supposedly the demands of justice. It could well be argued that the theorists were so afraid of upheavals that they ignored whatever injustice was in the existing political and social systems.²

The institution of property has its basis in the satisfaction of the economic needs of individuals. On that ground it seems obvious that the institution of property will continue to exist in one form or

2. Looking to this injustice in society Mill remarks:

If, therefore, the choice were to be made between communism with all its chances, and the present [1852] state of society with all its sufferings and injustices; if the institution of private property necessarily carried with it as a consequence, that the produce of labour should be apportioned as we now see it, almost in an inverse ratio to the labour ... if this or communism were the alternative, all the difficulties, great or small, of communism would be but as dust in the balance.

Mill, J.S., Principles of Political Economy, edited by Ashley, W.J., London 1909, p. 208.

another so long as there are human needs to satisfy. But the law of property in its present forms does not in fact apply wealth to the reasonable satisfaction of the economic needs of each individual. Why is it that the laws of property allow extreme differences in the possession of wealth so that the economic needs of the majority remain unsatisfied? And why should it be assumed that property systems which permit of extreme differences are justifiable at all? Property could be but is not, a means of securing to each individual the means of comfortable subsistence. It is this primary interest of satisfying his economic needs which a property owner has in his property. But if this function is basic to any justification of property, as I would assert, and if each individual who has a right to life must have the means to support life as well, then it follows that each individual has a right to sufficient property for that purpose. To take away the means to support life is to deprive one of one's life. Thus the right to life implies right to the means of subsistence, and it may be added, to the means of comfortable subsistence. The basic implication that I draw concerning the existence and continuation of the institution of property, is that there may as time changes and civilisation develops, grow a more socially just milieu for the maintenance of the institution of property.

That being the assumption from which I start, I shall proceed to a critical scrutiny of some classical theories which expressly or tacitly aim to justify property system on other principles.

Before that, I shall make some preliminary remarks (not unrelated to points already taken in previous chapters) about the social

context of the institution of property. The institution of property is a socio-legal institution. Both social and legal aspects of the institution of property are important for its continuation and existence. The chapter on the origin of property clearly points to the satisfaction of human needs as the basis of the institution of property though later developments show how it was moulded into different forms by the struggle for supremacy within various societies, and how unequal distribution and division came into existence. That shows how the institution of property acquired a predatory basis. In the course of development economic power came to be associated with political power, and the existing unequal system of property came to be regarded as a final solution before being challenged by the new socialist tendencies. In modern times there is a growing tendency in our social and legal developments to direct the institution of property towards what I regard as its proper function of meeting the subsistence needs of each individual.³ These signs are visible in national insurance schemes, educational systems, old age pension schemes, labour legislation, public works projects, food and drug laws, and other social legislation.

The Social Context

In approaching the problem of the justification of the institution of property in view of the above discussion some remarks made by

3. Renner states:

Every member of society must have a share, however humble, of the annual product, regardless of whether he has taken an active part in production or not.

Renner, K., The Institutions of Private Law and their Social Functions, edited by O. Kahn-Freund, London 1949, p. 74.

Adam Smith need consideration. He remarks:

The acquisition of valuable and extensive property ... necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three⁴ day's labour, civil government is not so necessary.

But civil governments, so far as they are instituted, are instituted for the preservation of peace⁵ and not only for the protection of the rights of property, though the ability of the courts to regulate property rights is one essential element in the preservation of peace and order.

History furnishes an ample demonstration of the necessity of positive law with machinery to enforce it. Wherever we find men dwelling together, there we observe law and government existing, in however rudimentary a form. Some authority superior to the individual controlling his actions is always apparent among savages and civilised alike.

As Thompson states:

Law is a natural necessity because the social relationship of men is naturally organic, made so by the natural appetites and wants of individual human beings; and the social organism cannot live without a resisting and controlling structure connecting all parts for the conservation of each.⁶

When Bentham⁷ talks about the least agreement among savages, he has expressed a fact out of which grows the necessity of law. Blackstone's remarks that "the only true and natural foundations of society are the wants and the fears of individuals,"⁸ refer to the fact out of which

4. Smith, A., The Wealth of Nations, edited by Scott, W.R., London 1925, vol. ii, p. 228.

5. Mill, J.S., op.cit., p. 201.

6. Thompson, D.G., Social Progress, London 1889, p. 23.

7. Bentham, J., Theory of Legislation, London 1876, pp. 112-113.

8. Blackstone, Commentaries, Vol. I, London 1830, p. 47.

social order emerges in the form of a common restraint and an authority sufficient to enforce it.

To argue that so far as governments are instituted they are solely to protect property rights, implies that government finds these rights already existing. This leads to ignoring the part played by a government in defining, altering, and creating new property rights. Moreover, to agree with the notion of pre-existing property rights is to admit that there is only one natural and national system of property, and is to ignore the various kinds of ownership existing in different modes of social order. Again even if it be granted that there are pre-existing property rights, it is clear that the duties and remedies which go with them are in need of revision from time to time in order to keep up with the development of new social relations. No system of specific duties and remedies can possibly embody for all times the requirements of social order.

Again Smith's remarks that government is to protect property which is valuable and extensive⁹ and no government is required where there is no property¹⁰ implies that those who have no property need no security. If Smith is right, there are a number of persons who have no property¹¹ at all and their desire for security is much less (or say

9. Smith, A., op.cit., p. 228.

10. Ibid.

11. Smith states:

Men who have no property can injure one another only in their persons or reputations. But when one man kills, wounds, beats, or defames another, though he to whom the injury is done suffers, he who does it receives no benefit. It is otherwise with the injuries to property.

Smith, A., op.cit., p. 227.

none) as compared to those who have property. Security is instituted only for property and nothing else. If by accident or chance those who are rich become poor, their desire for security evaporates. In a society of poor people the need of civil government for instituting security would be a paradox. The absurdity of these conclusions which logically follow from Smith's premises shows their falsity.

No government is necessary according to Smith if property does not exceed the value of two or three days labour.¹² Smith does not seem to think that if a man earns for two or three days, his labour is of such value as to need protection. The poor man who finds labour only for two or three days and prolongs his meagre earnings for his four or five days subsistence, if not provided protection against deprivation of the fruits of his labour, finds that the social system in which he is living is issuing his death warrant by depriving him of his subsistence. In fact Smith's theory of property is a protection not for safeguarding property rights but a device to protect the rich in their distribution of wealth and to curse the poverty of the poor.

Property is a socio-legal institution. It refers neither to richness nor to poverty. It is not wealth¹³ (a quantity of things owned beyond the needs of immediate use). It is a right, a facility by which man encroaches on the external physical world. The institution of property is a social institution; its individual aspect is visible only in

12. Smith, A., *op.cit.*, p. 228.

13. The distinction between wealth and property is clearly made in chapter 1.

the sense that it is in the service of an individual. Ihering makes this very clear when he states:

The only reason that the demands of society are not so evident in property is the circumstance that the proprietor's own interest determines him as a rule to use his property in such a way as will further the interests of society along with his own.¹⁴

Even in its individual aspect, it is limited and subject to various social limitations. The use of property by an owner to the detriment of others is not allowed. It has recently been shown that even under the classical Roman law conceptions of dominium

an owner was free to build up his house as high as he wished providing that it did not cut off the light to his neighbour's house to an intolerable extent. He had to leave his neighbour at least enough light for ordinary everyday existence.¹⁵

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14. Ihering, Law as a Means to an End, trans. Isaac Husik, New York 1968, p. 368.

Hobson states:

If an individual is living a solitary, self-sufficient life out of society, the attribution of these natural rights is an empty form; the word "right" has here no content or significance. If he is living as a member of society, since he is an organic being in an organic society, no action of his can be considered purely self-regarding or wholly void of social import. Some individual actions may be so indirect, so slight, or so incalculable in their social effects, that we speak of them and treat them as "self-regarding", and hold it foolish for society, either through the state or otherwise, to interfere with individual liberty with respect to them. But such "individual rights" can have no natural or absolute validity; for society, and not the individual, must clearly claim, in the social interest, to determine what actions shall fall within this "self-regarding" class. Thus these rights, if rights they be called, are sanctioned and bounded by society. Social utility must be paramount and absolute in marking the limits of such "rights".

Hobson, J.A., The Social Problem, London 1901, pp. 88-89.

15. Rodger, A., Owners and Neighbours in Roman Law, Oxford 1972, p. 38.

Legal systems are even going to the extent of safeguarding the third party not only against the infringement of his legal right but against the malicious use of a right which exclusively serves the purpose of hurting others. Holmes, J. made it clear that the right to use one's property for the sole purpose of injuring others is not one of the necessary rights of ownership. It is not a right for the sake of which property is recognised by law.¹⁶

Even the most ardent advocates of the absolute conception of property could scarcely say of property that it is in all or any legal systems without restrictions. An absolute conception of property is possible in legal logic but not in any legal-social evaluation of property; and property is essentially a legal-social concept. There is no such thing as entirely private property. An individual is a product of social circumstances. There is no isolated and self-sufficient individual. Within the period of social development no individual is living by itself. The inner personality of the individual is not his own in the sense of not being affected or influenced by surrounding circumstances. If this be so any individual always represents the synthesis of derived emotions and ideas and his personality is the product of his intercourse with other personalities. When inner personality is not one's own, how can one regard one's outer personality or property as entirely private? There is thus no doubt that legal or social restrictions in the use of property which an individual regards as his own, are inherent elements of property. It is safe to say that strictly speaking there is

16. Rideout v. Knox, 19 N.E.390 (1889).

no absolute private property. As Dunning states:

Private property ceases to be such by natural law in case of necessity, by divine law, for the sake of charity, and by the civil law, for the benefit (utilitas) of the state.¹⁷

In the history of ownership, limitations on private property are not only historically and legally necessary, but it is also the case that their existence is a corollary to all theories of the rights of property. Blackstone who is considered the most vocal English exponent of the absoluteness of the right of property stated:

So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no¹⁸ not even for the general good of the whole community.

Again he states:

The right of property is that sole and despotic domonion which one man claims and exercises over the external things of the world, in total exclusion¹⁹ of the right of any other individual in the universe.

But he realised that, that absolute characterisation of property is extravagant and untenable; he elsewhere qualifies this despotism by making it subject to control and diminution by the laws of the land.²⁰

Private property includes the right to enjoy and dispose of things in the manner allowed by law. The economic necessity to dispose of things finds its expression in legal systems. Similarly Austin's definition of property as

17. Dunning, W.A., Political Theories, London 1902, p. 219.

18. Blackstone, Commentaries, Vol. I, London 1830, p. 138.

19. Ibid, vol. ii, pp.1-2.

20. Ibid, vol. i, p. 138.

a right - indefinite in point of user - unrestrained
in point of disposition - and²¹ unlimited in point of duration
- over a determinate thing.

is out of harmony with the social realities unless we drop all the negatives in his definition. If one reads these definitions along with the statement of Ihering that

The idea of property cannot carry²² with it anything that is contrary to the idea of society,

one finds that the institution of property is subject to all types of social restrictions and is protected by law subject to those restrictions.

One can appreciate how important the subject has become in modern times by observing the introduction of a more and more restricted conception of property. This has brought a change in the very idea or meaning of private property since it first became established in history.²³ The very conception of it is different from what it was a century or two centuries ago. At one time the right of property implied the right to do with an object, within the limits of law, as one pleased. One had the right to use and abuse. Even if one's property right was injurious to others, such an abuse might be allowed as a part of the law of property.²⁴ Restrictions to that effect were very trifling in earlier stages of society. But at present, restrictions cover ever wider and wider fields. Toleration of the injurious effects of the abuse of property rights (though it was once

21. Austin, Jurisprudence, vol. ii, London 1873, pp. 817-818.

22. Ihering, op.cit. p. 389.

23. See chapter ii.

24. See chapter iv.

within the legal restrictions) has been eliminated and the dominant contemporary idea is that property rights are to promote individual purposes only so far as consistent with social purposes. The modern conception of rights is based on social well-being. The right of property is exercised as a social trust, and forces the individual to reflect upon his right in terms of its social purpose. The doctrine of legally permissible abuses of right is rejected in modern times and is replaced by acceptance only of conduct commonly regarded as conducive to social well-being. The three doctrines - police power, taxation, and eminent domain have changed the conception of property, so that it could hardly be said to exist as variant of the older conception. A new theory is gradually coming into supremacy, and Dietze remarks:

It was argued that the advantages accruing from them to other individuals and society were out of proportion to the disadvantages suffered by the proprietor.²⁵

All this makes it plain that rights of private property cannot be justified in terms of the logical consequences of acknowledging the concept of property at all.

Closer investigations have shown that the institution of private property has not existed in all forms of society. It was not the individual but society which first asserted the principle of ownership. It was the tribe, the clan or the family which asserted - this is ours. Maine says, "Ancient law knows next to nothing of individuals."²⁶ Communal possession is the preliminary stage in the evolution of property.

25. Dietze, G., In Defense of Property, London 1971, paperback ed. p. 109.

26. Maine, H., Ancient Law, London 1880, p. 258.

Private ownership came as a later step in the long series of changes, though this transformation is obscure to human knowledge. One needs to quote the words of Maine about the beginning and transformation of this change:

We at length know something concerning the beginnings of the great institution of property in land. The collective ownership of the soil by groups of men either in fact united by blood-relationship, or believing or assuming that they are so united, is now entitled to take rank as an ascertained primitive phenomenon, once universally characterising those communities of mankind between whose civilisation and ²⁷our own there is any distinct connection or analogy.

Again in Ancient Law he says:

We have the strongest reason for thinking that property once belonged ... to larger societies ... but the mode of transition ²⁸from ancient to modern ownership [*is*] obscure at best.

Private property cannot, therefore, claim for its justification that it has always existed as an institution. It is most impressive to observe how institutions begin, alter, and take new shape and part from the old but at the same time maintain continuity with the old. No institution can continue its usual life without changing itself to the new circumstances. As Maine states:

No institution of the primitive world is likely to have been preserved to our day, unless it has ²⁹acquired an elasticity foreign to its original nature.

Private property is a long long step from those conditions of communal

27. Maine, H., The Early History of Institutions, London 1880, pp. 1-2.

28. Maine, H., Ancient Law, p. 268.

29. Maine, H., Ancient Law, p. 264.

possession. As a first principle we believe that every thing must have an owner. Human nature may be the same in its fundamental characteristics, but in every period it is living under new and widely different kinds of civilisation. The institution of property at every stage represents a new conception. The change is slow and silent as pointed out by Dietze.³⁰ If we look at the present and compare it with the past the difference in the end amounts to something like a revolution. So it is with changing conception of property. The rights of property existing under Roman law no longer exist now in the same sense. Law does not allow a man to spend his own money in all sorts of gambling and opium eating, nor does it allow him to destroy his own money by defacing currency. Requirements on cigarette manufacturers to declare their own product as injurious to health are a most recent example of the way change is wrought in the conception of property. All such restrictions on the right of property have been justified on the ground of public welfare for which the institution of property exists.

Civilisation is a rare event in human history. It begins, as Sheldon states

When the epoch has been reached at which men, besides asserting "This is mine", come also to say, "That is thine."³¹

What is it that authorises a man to say of anything - This is mine?

What gives him the right to what he possesses? Property is a social institution. Its function is to fulfil the needs of human existence. What

30. Dietze, G., op.cit., Ch. IV.

31. Sheldon, W.L., "What Justifies Private Property", I.J.E., 1893, p. 21.

is the inherent quality of the institution of property that justifies the quantitative aspect of the institution of property? It is not an issue that pertains exclusively to one element of human society. We all own something, however small it may be. Of each thing that we possess, we say - this is mine. Why is it mine? To what extent is it right for me to dispose of it as I please? It is for each and all of us, irrespective of our condition in life, to answer the query as to what justifies in speaking of anything as - this is mine. At this point both legal science and social sciences like economics and ethics etc. provide an answer. Men are troubled in thought over this question of property. They believe they are right in their possessions yet they introspect to seek justifications of their convictions. They feel uncomfortable because they need justification for their possessions. How to justify private property has become a vexed question because its justification is not found in the idea of property itself.

Occupation theory

The question of justification of private property cannot be answered by studying the origin of property and one who sets out with this end in view will certainly end as a corrupter of history and science. Nor, as has been shown, is the justification of private property found in the idea of property itself. Still private property does exist and is a recognised institution. Restrictions on private property are justified on social grounds, but what are the grounds for justification of private property itself?

One obvious, and often restated, argument is that private

property is nothing but restrictions on appropriation of objects, converted into a right by labour, necessary for human existence. Thus if appropriation is essential to life, the justification for the right of appropriation is social and ethical. Property - the appropriation of which is required to fulfil the necessity of human living is the only justifiable and justified property. As Bastiat says:

Man lives and develops by appropriating certain objects. Appropriation is a natural, providential phenomenon, essential to life, and property is ³²only appropriation converted into a right by labour.

Without understanding the real facts, it was at first supposed by Roman jurists and others including Grotius, Blackstone, Savigny, etc. that justifications of property can be found by establishing a principle as to how it came to exist and be established. They took it for granted that private possession is a reward for first occupancy. The theory of occupancy is the result of Roman idea of acquisition of *res nullius*. Their belief that all things are *res nullius* in a state of nature is belied by historical facts and legal systems. The origin of property is communal and an act of occupation is a singular act. Again, there can be a recognition by society that the first occupier becomes the owner of a *res nullius* only when society first gives its recognition to the notion of *res nullius*. It is an expression of a simple and accepted principle under most legal systems that "everything must have an owner". The state of war which some jurists describe as state of nature does not admit of any such principle of *res nullius* and first

32. Quoted in Laveleye, Primitive Property, London 1878, p. xli.

occupancy. For example, during turbulent periods in various countries,³³ evacuee property laws were passed which falsifies the theory of first occupancy as a title to property. Savigny's formula that "property is founded on adverse possession and ripened by prescription" is open to similar objections. Proudhon would not allow that wrong can be made right by prescription. Maine raised a very cogent and significant point against the doctrine when he states:

It is not wonderful that property began in adverse possession. It is not surprising that the first proprietor should have been the strong man armed who kept his goods in peace. But why it was that lapse of time created a sentiment of respect for his possession ...

I venture to state my opinion that the popular impression in reference to the part played by occupancy in the first stages of civilisation directly reverses the truth.

Again Maine states:

The sentiment in which this doctrine originated is absolutely irreconcilable with that infrequency and uncertainty of proprietary rights which distinguish the beginnings of civilisation. Its true basis seems to be, not an instinctive bias towards the institution of Property, but a presumption, arising out of the long continuance of that institution, that everything ought to have an owner. When possession is taken of a "res nullius", that is, of an object which is not, or has never been, reduced to dominion, the possessor is permitted to become proprietor from a feeling that all valuable things are naturally the subjects of an exclusive enjoyment, and that in the given case there is no one to invest with the right of property except the Occupant. The Occupant, in short, becomes the owner, because all things are presumed to be somebody's property and because no one can be pointed out as having a better³⁵ right than he to the proprietorship of this particular thing.

Another suggestion given by John Stuart Mill that it is not occupancy

33. Evacuee Property Act in India 1948.

34. Maine, Ancient Law, pp. 255-256.

35. Maine, Ancient Law, pp. 256-257.

that gave the right of property but the purpose of maintaining peace and order in primitive systems matured occupancy into right of property.

To quote the words of Mill:

Private property, as an institution, did not owe its origin to any of those considerations of utility, which plead for the maintenance of it when established. Enough is known of rude ages, both from history and from analogous states of society in our own time, to show that tribunals (which always precede laws) were originally established, not to determine rights, but to repress violence and terminate quarrels. With this object chiefly in view, they naturally enough gave legal effect to first occupancy, by treating as the aggressor the first person who first commenced violence, by turning, or attempting to turn, another out of possession. The preservation of the peace, which was the original object of civil government, was thus attained: while by confirming, to those who already possessed it, even what was not the fruit of personal exertion, a guarantee was incidentally given to them³⁶ and others that they would be protected in what was so.

Upon these theories one may justify past occupancies for being long established,³⁷ but ownership of the present day commercial properties would be at best remotely analogous because it is not might but law that bestows right upon occupancy. Legal and social evolution reveals to us a stage of right based on appropriation, not any supposed state of nature in which individuals by 'natural right' occupy *res nullius* objects. Property is a creature of law which furnishes it with its ethical basis.

Bossuet says:

Banish governments, and the earth and all its fruits are as much the common property of all mankind as the air and the light. According to this primitive natural

36. Mill, J.S., *op. cit.*, p. 201.

37. The stability of an institution being long established cannot be a criterion for its justification that it is right. Stability is not a criterion of ideal sense of justice. Stability might be the result of suppression and hence injustice.

right, no one has an exclusive right to anything, but every thing is a prey for all. In a regulated government no individual may occupy anything ... Hence arises the right of property, and, generally speaking, every right must spring from public authority.

A similar view is expressed by Bentham when he states:

I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me ...

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.³⁹

The principle of occupancy is thus not a principle of justification of private property. As Mill suggests:

In considering the institution of property as a question of social philosophy, we must leave out of consideration its actual origin.⁴⁰

Prescriptive occupation is recognised even today,⁴¹ but it is a principle for settling or preventing disputes. Law does not always stick to abstract justice at the expense of peace and security. The theory of occupancy is, thus, not a theory about the justification of property but a theory of convenience. Second, it ignores the main idea of property - the appropriation of external physical objects necessary for human existence since it leaves those who have nothing to occupy without direct access to means of subsistence. It is thus quite certain that

38. Quoted in Laveleye, op.cit., p. 344.

39. Bentham, op.cit., pp. 112-113.

40. Mill, op.cit., p. 201.

41. The philosophy of the Statute of Limitation is not based on sense of justice but preservation and stability. If an individual has held or occupied property for a certain period, he is given the title to it. Law sets a limit beyond which it does not like to interfere.

one cannot justify private property through the notion that it is originally established by occupancy.

It has been asserted that ownership is utterly without justification. But as yet the world accepts the institution of property in one form or the other. The issue is to square private property with the function for which the institution exists. Every one has asked how the institution of private property came to be established. What is its origin? But there has been less attention to the question why it was established and should continue to be accepted. What purpose does it serve? Any theory which purports to justify the institution of private property must answer that question.

In my submission the best answer to these inquiries takes account of the right to the necessities of life implied in the right to life for

you do take my life when you do take the means by
which I live.⁴²

Contractarian arguments

Sometimes the justification of the institution of property is found in the contract which individuals, at some time in the past, perhaps thousands of years ago, entered to respect the rights of one another. The right of property is thought to be one of them. This original contract is considered the source of the right of property and hence its justification. In the first place there is no evidence of this original contract. Even if one presumes the existence of such a

42. Hobson, J.A., op.cit., p. 90.

contract, the following questions arise. Is it still binding after thousands of years? Is it not affected by the rule of perpetuity? Is not the doctrine of frustration applicable to it with the change of circumstances? Men obey contracts because of the mutual advantage they derive from their performance, independent of contracts. It is to their common interest to obey. If this is so, the presumption of an original contract becomes superfluous. It is the mutual interest that brought the institution of property into existence. Hume gives a final blow to the idea of original contract when he states:

Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally either on usurpation or conquest or both, without any pretence of a fair consent or voluntary subjection of the people. When an artful and bold man is placed at the head of an army or faction, it is often easy for him, by employing sometimes violence, sometimes false pretences, to establish his dominion over a people a hundred times more numerous than his partisans ... By such arts as these many governments have been established; and this ⁴³ is all the original contract which they have to boast of.

Hume thus states:

The original establishment ⁴⁴ was formed by violence and submitted to from necessity.

The justification of such governments is in the utility of the function they now perform, not in any pretended legitimacy of their foundation. Applying this negation of original contract to the institution of property, Hume states:

It is confessed that private justice, or the abstinence

43. Hume's Moral and Political Philosophy, ed. Aiken, H.D., New York 1948, p. 360.

44. Ibid p. 363.

from the properties of others, is a most cardinal virtue. Yet reason tells us that there is no property in durable objects such as land or houses, when carefully examined in passing from hand to hand, but must in ⁴⁵some period have been founded on fraud and injustice.

Kant ⁴⁶ comes to the rescue of the theory of contract by holding that provisional rights are created by specification and become final only by the consent of the members of the society. He does not regard it as a historical fact, but as a juridical necessity. But the moment one speaks of juridical necessities, one begs the question of general principles of law which, it is submitted, belong to the realities of social institutions, and cannot be established a priori by transcendental reasoning.

The justification of property does not depend on contract or convention. Such a contract does not secure to the individuals the fruits of their labour on which property depends. Nor does it take account of the necessity of private property to meet the need of the individual for the necessary means of living.

Property as the fruit of labour

What constitutes a valid title to property is enunciated by Locke in a very innocent and simple principle - one who labours is entitled to the fruits of labour. Labour is the justification of property. Locke states:

Though the earth and all inferior creatures be

45. Ibid, p. 368.

46. Kant, Philosophy of Law, trans. Hastie, W., Edinburgh 1887, pp. 81-99.

common to all men, yet every man has a property in his own person; this nobody has any right to but himself.⁴⁷

But the ownership of one's body is not property but poverty.

One's body is a means to acquire property but not itself property.

How can an arm or leg be the object of property? They are not objects of appropriation.

Locke further states:

The labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.⁴⁸

The principle enunciated in Locke's theory is very simple but it does not harmonise with real facts and circumstances. It gives to the individual 'right to the whole produce of labour'. It is possible only if production is a single man's act. There is, even in the primitive economy particularly, no individual production and no individual productivity. The isolated individual is not a productive agent. Production takes place only in society - in a group, large or small. It is thus not possible to point out which part has been produced by a particular individual. No one can say: 'that is absolutely mine'. But one can separate men in their consumption if not in their production. What one eats, one digests as well.

A more fatal objection concerns the creative process. Wealth

47. Locke, J., The Second Treatise of Civil Government and A Letter Concerning Toleration, ed. J.W. Gough, Oxford 1946, p. 15.

48. *Ibid*, p. 15.

is produced out of something, out of previously existing wealth or sources of wealth. If it is already owned or possessed privately then all members of society have not an equal opportunity of creating wealth. Thus the principle, production is the produce of the producer, becomes illusory. The institution of private property is recognised not because of any inherent right of the individual, but because it is an institution which is thought to be for the good of society.

Locke's theory that the natural owner is the person who has produced an article directly appeals to human sentiments and (similarly to the theories of Kant and Hegel) attaches property to the owner's being. It has always been a favourite plea that property was rooted in human nature before it appeared in social systems. But the relation between an object of labour and a labourer imposes no obligation on others to regard that object as his property. It leads to an idea out of which the concept of property is formed. This intimate relationship with the article produced which is the immediate result of creative industry is like man's shadow, the reflection of his image in water. These articles produced lie outside the limit of his person and to many of them he stands in an economic relation rather than in an organic relation. As Veblen states:

Under the guidance of this habit of thought, the relation of any individual to his personal effects is conceived to be of a more intimate kind than that of ownership simply. Ownership is ⁴⁹too external and colorless a term to describe the fact.

Locke imposes a limit on appropriation of property. His

49. Veblen, T., "The Beginning of Ownership", A.J.S., 1898, p. 355.

theory is based on equal rights of all individuals. In his theory he maintains the spirit of natural law that all men are equal and have equal rights of appropriation as

labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.⁵⁰

In a state of nature where property is common, man should take as much as is necessary for him. For this act of appropriation he does not require the consent of his fellow beings because

If such a consent as that was necessary, man had⁵¹ starved, notwithstanding the plenty God had given him.

Locke makes a presumption that in state of nature everybody takes care of others because everybody will take as much as is required:

No man's labour could subdue or appropriate all; nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to entrench upon the right of another, or acquire to himself a property to the prejudice of his neighbour, who would still have room for as good and as large a possession (after the other⁵² had taken out his) as before it was appropriated.

If in the state of nature men are so careful of one another, how did they become so selfish when the state of nature came to an end? Habit is the fly-wheel of character. Suppose that I completely agree (for the time being) with Hobbes that man is selfish by nature. Then either men are not careful of one another in the state of nature, or it is a mere wish of Locke that they so behave themselves. Second,

50. Locke, op.cit., p. 15.

51. Ibid, p. 16.

52. Ibid, pp. 18-19.

Locke is postulating a society where everything is in abundance; needs of the individuals are uniform. But such a society, even if presumptive, where needs of the individuals are the same, is illusory. Property must keep pace with the needs of the individuals or, either the one or the other must perish. With the disparity of needs certain things will be absorbed quickly and others remain dis-proportionate. In such a state of things disputes are bound to occur irrespective of their good character in state of nature. Third, Locke does not provide any remedy where an individual takes more than his share. Where an individual has collected more than his share and has not left enough for others, either they must die of hunger and let nature in Malthus's sense execute her order; or they must revolt and deprive some one else of the fruits of his labour. If such a thing happens, or if Locke lets it happen, his idea of the state of nature falls down. Locke does not provide any solution to the problem except by insisting on his theory of social contract that it allows unequal division of property and thus discarding any idea of revolt by those who have nothing since they consent to have nothing; a situation which indeed seems a paradox. In fact Locke was content to devise natural limits to private property. But his limits devised by the method of

As much as any one can make use of to any advantage
of life before it spoils,⁵³

were promptly overridden with the invention of money (as conceived by Locke) and the tacit agreement of men to put a value on it as an instrument of exchange.⁵⁴ Locke indeed considered it legitimate for men to

53. Ibid, p. 17.

54. Ibid, p. 26.

collect as much as possible because it does not spoil. Here one can argue with Locke and conclude that it is not use but rather perishability that is the real limit of private property. Excesses of private property do not consist in hoarding of non-perishable material but in hoarding perishable stuff. Locke in fact did not follow the logical conclusions of his own theory but was busy in fact defending the status quo. As Larkin says:

While Locke seems to recognise the importance of distinguishing between what one may call essential or natural and positive or institutional property rights, he appears, on the whole, to be so convinced of the pragmatic value of existing property arrangements that he is disposed to regard them as natural and necessary. Thus it is a matter of some difficulty to determine how far, if at all, he desired that the criterion of labour and human needs, which limited the right of property at one period of the "state of nature", should be applied to the facts of property in his own time ... Probably Locke did not realise the far reaching consequences of this concession to self-interest, ... any more than he perceived the revolutionary import of his statement that human needs and labour set natural limits to the acquisition of property.

The net result, however, of his vacillating attitude was that a theory of property rights based on the legal status quo of his day tended to be substituted for one which traced the justification of property to its origin in human needs and human labour. In other words, the state's sanction could be regarded as a sufficient justification of large fortunes no matter by what means acquired.⁵⁵

Larkin's assessment is right because Locke also provided a concession to the then prevailing views that the poor are lazy and immoral, it is their way of life that is responsible for their poverty by insisting that "the penury of his condition required it of him"⁵⁶ to labour for his

55. Larkin, P., Property in the Eighteenth Century with Special Reference to England and Locke, London 1930, pp. 77-79.

56. Locke, op.cit., p. 17.

existence which led to the minimum of wages for labour so as to secure that their poverty incites them to work.

Landed property can be acquired in the same way as any other property - by mixing one's labour with it; and thus landed property is subject to the same limitations as any other property. As Locke states:

As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property.

For he that leaves as much as another⁵⁷ can make use of does as good as take nothing at all.

Locke's argument is that a man can take as much land for cultivation as he can make use of, and second, as much the product of which he can use. Suppose one man takes one acre of very fertile land the product of which is sufficient for his use. Another man takes two acres of arid land and gets produce sufficient for his use. Through extensive labour and he makes this land as fertile as that of a first man, and starts getting more than sufficient for his use. According to Locke's principle he has more than his fair share, but there is no way of depriving him of his labour because that would again be a robbery as per Locke's principle of labour. The reason for such paradoxes in his theory is that he builds his theory on presumptions, which ought to exist in society, and tried to apply them to existing society where these do not work.⁵⁸

57. Ibid, pp. 17-18.

58. In fact the postulate of the 'state of nature' should be used to show not what has occurred in the past, but what would occur if intelligent decisions should be made in future social arrangements.

Private property in land may have been justified on Locke's principle in the beginning, that is, in the state of nature, if there was any such state, but it is difficult to see how it can be justified now.

Legislatures are introducing wider and wider restrictions on property, especially on land, due to increase in population and dwindling natural resources. Thus Locke's theory, though its truth is very doubtful, applies only to a particular time. It cannot be of general application. Even in Locke's time it was not true, apart from its political implications, to defend his theory of limited government.⁵⁹

Locke admits that a state of nature cannot continue in which whole property remains common.⁶⁰ He gave two reasons by which state of nature came to an end and resulted in unequal possession.

1) Division of property by contract.⁶¹

59. Locke's political views are beyond the scope of this thesis.

60. Locke states:

God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated.

Op. cit., p. 18.

61. Locke stated:

Men at first, for the most part, contented themselves with what unassisted nature offered to their necessities; and though afterwards, in some parts of the world (where the increase of people and stock, with the use of money, had made land scarce, and so of some value), the several communities settled the bounds of their distinct territories, and, by laws within themselves, regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began.

Ibid, p. 24.

2) Introduction of money.⁶²

Locke here introduces a new element, which he could not avoid to explain the unequal possession of property, that property was the conventional creation of men. In the original state of nature property was common. Civil society is the result of agreement and agreement is binding because of natural law. It is not clear in his theory, how he reconciles the thesis that property is the product of human labour, a natural right which existed before the agreement, with the fact that it came to be regulated by positive law which even creates new property rights which were either non-existent in state of nature or in Locke's time. Locke's explanation of this reconciliation is self-contradictory because either the natural rights do not change and remain the same; or, if they change, they are not natural rights. He claims that private property itself requires no justification; but surely the property that the modern state creates is justified on the ground of social welfare by reason of the duties of property and the responsibilities of ownership. The contract which brought the state into existence merely "settled the property which labour and industry began,"⁶³ for those "who

62. Locke further explains:

And thus came in the use of money - some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life.

And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them.

Ibid, p. 25.

63. Ibid, p. 24.

have made and multiplied positive laws to determine property, this original law of nature, for the beginning of property in what was before common, still takes place".⁶⁴ Again he says:

As families increased, and industry enlarged their stocks, their possessions enlarged with the need of them; but yet it was commonly without any fixed property in the ground they made use of, till they incorporated, settled themselves together, and built cities; and then, by consent, they came in time to set out the bounds of their distinct territories, and agree on limits between them and their neighbours, and by laws within themselves, settled the properties of those of the same society.⁶⁵

He gives recognition to property rights created by men which are valid only because men have agreed to respect them. He even goes to the length of admitting the fully positive measures in dealing with property rights when he states:

In governments the laws regulate the right of property, and the possession of land is determined by positive constitutions.⁶⁶

This is thus turning to the theory of property which was later promoted by the positivist school. Locke's sense of convenience⁶⁷ led him to contradict his own theory. On the one hand he gives the impression that rights are natural,⁶⁸ inborn and inalienable, and on the other hand

64. Ibid, p. 16.

65. Ibid, p. 21.

66. Ibid, p. 26.

67. Strictly speaking Locke is a utilitarian. In his theory of knowledge he denies the existence of innate and inborn ideas. In his theory of property he defends his utilitarianism and states "Right and convenience went together." (Locke, op.cit., p. 26) But in general, when dealing with theory of property, he treats his subject as if property rights are innate and inborn.

68. What is the meaning of natural right? Is it inborn and innate in Locke's theory of property? Or does it mean a right which is necessary for human living? To say that right of property is natural in the sense that without it man cannot survive does not mean that it is inborn. It is the recognition of this subsistence (see over)

tries to justify them on utilitarian basis.

Locke enunciated his theory that natural rights give to the producer the product of his produce. He introduced an equalitarian principle. But in the end he implied that it was the right of each man to keep what he had, however he had acquired it and whether he could use it or not. He says that modern property rights are instituted by law but he ended by asserting that they are superior to law and states:

The reason why men enter into society is the preservation of their property; and the end why they choose and authorise a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society, to limit the power and moderate the dominion of every part and member of the society. For since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs secure by entering into society, and for which the people submitted themselves to legislators of their own making, whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience, and are left to the common refuge which God hath provided for all men against force and violence.

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68. (Continued from previous page) that constitutes the right of property, and this recognition does not make it a 'natural right', at any rate in the sense of the 'innate' one. Right of property is not only based on subsistence but something more - it is economic as well. It refers not only to food but the means of appropriation. Thus the right of property is not inborn but a conventional right.

Second, if right of property is secured only by labour, what about a man who is totally handicapped for his life? He cannot mix his labour, and thus cannot get property. In fact he is born propertyless, or with less property, since according to Locke property is in one's faculties. But even Locke would not refuse a life to such a man, and would arrange for his subsistence. Thus the right to property is not inborn, what is inborn is right of subsistence. Property is to be based on this right of subsistence and not on labour. Labour is only one of the means to secure property.

69. Locke, op.cit., pp. 107-108.

Philosophers of natural law have not been able to derive property from the law of nature. Property cannot be derived from laws of nature, but laws of nature can provide the contents of a good society for the better living of her members. The laws of property have their basis in human needs and wants. The logical obscurities in Locke's theory and the futility of attempting to justify ownership on natural laws is well demonstrated by the utilitarian arguments of Hume and Bentham who found a substitute for it; and by socialist writers who took Locke's theory to its logical conclusion. However, the principle that produce is the product of the producer remained the accepted principle with all 'isms'.

Locke's principle cannot seek justification in present social conditions and environments because to be rich one uses the labour of others. As Mill says:

The laws of property have never yet conformed to the principles⁷⁰ on which the justification of private property rests.

Capital is not personality, even though Locke seeks the justification of capital ownership in one's organic faculties.

Utilitarianism - Expedience and security of possessions

There is another aspect of the problem which needs careful introduction and expression to understand it as a justification of private property. The basic idea is that of expediency. The utilitarian thesis which has been popularised by Bentham, but which was previously

70. Mill, op.cit., p. 208.

stated by David Hume, is that private property and its laws have no other justification than utility. The obligation which we recognise to respect each other's property, depends on the existence of conventions and laws which are justified as essential both to our own and to the public interest. For Hume states if

the necessities of human race continue the same as at present, yet the mind is so enlarged, and so replete with friendship and generosity, that every man has the utmost tenderness for every man, and feels no more concern for his own interest than for that of his fellows; it seems evident, that the use of justice would, in this case, be suspended by such an extensive benevolence, nor would the divisions and barriers of property and obligation have ever been thought of.

An individual in seeking his happiness promotes that of the community. In promoting his interest, he promotes the general interest. Applying this principle of utility to property, Hume argues that property and its laws are in fact based on utilitarian principles, and states

Not only is it requisite, for the peace and interest of society, that men's possessions should be separated; but the rules, which we follow, in making the separation, are such as can best be contrived to serve farther the interests of society.⁷²

Hume says that in a society where there is unlimited supply of goods, there is no need of laws of property, since they serve no purpose.⁷³

Hume agrees with Locke that laws should secure to the producer the product of his industry.⁷⁴ But whereas Locke seeks a

71. Hume's Moral and Political Philosophy, ed. Aiken, H.D., New York 1948, p. 186.

72. Ibid, p. 192.

73. Hume states:

For what purpose make a partition of goods, where every one has already more than enough? ... Why call this object mine, when, upon the seizing of it by another, I need but stretch out my hand to possess myself to what is equally valuable?

Ibid, p. 185.

74. Ibid, p. 194.

natural law justification, Hume justifies private property on a utilitarian basis and states:

Examine the writers on the law of nature; and you will always find, that, whatever principles they set out with, they are sure to terminate here at last, and to assign, as the ultimate reason for every rule which they establish, the convenience and necessities of mankind.⁷⁵

Hume objects to Locke's idea that an individual joins his labour with the object. The connection between the labourer and the object of his labour imposes no obligation on other men to regard that object as his property. At the most such a relation leads to an idea of ownership. Hume, who is generally as the founder of the modern utilitarianism gave the idea that all duties consist in promoting the general good, that is, happiness in the sense of pleasure. If all duties spring from this principle, then rights must spring from the same principle. Thus the right of property and obligations spring not from this close relation, as Locke believes, but from utilitarian considerations of the promotion of happiness. Hume agrees with the theory of social contract only in the very diluted sense that the convention is defined as a sense of common interest which leads each man to concur with others, into a general plan or system of actions which tends to public utility. Nothing but the sense of advantage is the basis of convention.⁷⁶ The laws of property are conventions which men obey because it is normally in their common interest to do so.

Hume examines a number of possibilities to find out the basis

75. Ibid, p. 194.

76. Ibid, pp. 357-358.

on which a man should acquire property. Hume clearly rejects an idea that property ought to be proportionate to man's virtues. Hume says:

... were mankind to execute such a law; so great is the uncertainty of merit, both from its natural obscurity, and from the self-conceit of each individual, that no determinate rule of conduct would ever result from it; and the total dissolution of society must be the immediate consequence. Fanatics may suppose, that dominion is founded on grace, and that saints alone inherit the earth; but the civil magistrate very justly puts these sublime theorists on the same footing with common robbers. ⁷⁷

The second alternative, Hume scrutinises, is of absolute equality of property. He rejects an idea of absolute equality and regards it as a work of political fanatics. ⁷⁸ About equality he says:

It must, indeed, be confessed, that nature is so liberal to mankind, that, were all her presents equally divided among the species, and improved by art and industry, every individual would enjoy all the necessaries, and even most of the comforts of life; nor would ever be liable to any ills, but such as might accidentally arise from the sickly frame and constitution of his body. It must also be confessed, that, wherever we depart from this equality, we rob the poor of more satisfaction than we add to the rich, ... It may appear withal, that the rule of equality, as it would be highly useful, is not altogether impracticable, but has ⁷⁹ taken place, at least in an imperfect degree, in ... Sparta.

But he further adds:

... however specious these ideas of perfect equality may seem, they are really, at bottom, impracticable; and were they not so, would be extremely pernicious to human society. Render possessions ever so equal, men's different degrees of art, care, and industry will immediately break that equality. Or if you check these virtues, you reduce society to the most extreme indigence; and instead of preventing want and beggary in a few, render it

77. Ibid, pp. 192-193.

78. Ibid, p. 193.

79. Ibid, p. 193.

unavoidable to the whole community. The most rigorous inquisition too is requisite to watch every inequality on its first appearance; and the most severe jurisdiction, to punish and redress it. But besides, that so much authority must soon degenerate into tyranny, and be exerted with great partialities; who can possibly be possessed of it, in such a situation as is here supposed? Perfect equality of possessions, destroying all subordination, weakens extremely the authority of magistracy, and must reduce all power nearly to a level, as well as property.⁸⁰

The third alternative which Hume recom^mends, is similar to that of Locke, though justified it on different grounds:

Who sees not ... that whatever is produced or improved by a man's art or industry ought, for ever, to be secured to him, in order to give encouragement to such useful habits and accomplishments? That the property ought also to descend to children and relations, for the same useful purpose? That it may be alienated by consent, in order to beget that commerce and intercourse which is so beneficial to human society? And that all contracts and promises ought carefully to be fulfilled in order to secure mutual trust and confidence, by which the general interest of mankind is so much promoted?⁸¹

Hume from the very beginning was convinced that Locke and his followers have confused between natural rights and utilitarian principles. Hume argues⁸² that uninstructed nature does not make any distinction between what is to be mine and what yours. In fact, Hume argues, all writers of natural law philosophy act on the principle of convenience and necessities of mankind. And this convenience and necessity is the ultimate basis of all rules.

Hume is, thus, also the proponent of an idea which would

80. Ibid, pp. 193-194.

81. Ibid, p. 194.

82. Ibid, p. 194.

ascribe the whole produce of labour to the labourer. But his aim in enunciating and supporting such a theory is the happiness and the interest of human society. As he says:

We must have recourse to statutes, customs, precedents, analogies, and a hundred other circumstances; ... But the ultimate point, in which they all professedly terminate, is the interest and happiness of human society. Where this enters not into consideration, nothing can appear more whimsical, unnatural, and even superstitious, then all or most of the laws of justice and of property.⁸³

By insisting that all laws of property are conventions and not natural as Locke claims, since uninstructed nature surely never made the distinction between mine and yours, Hume makes all proprietary questions subordinate to the authority of civil laws, as he says - civil laws here supply the place of the natural code.⁸⁴ Hume thus made an improvement on natural law theories by establishing the authority of state law which is the binding force to social stability. He, like Locke, though through the different path of positive law, favours maintaining the free play of private property. So the labour on which Hume insists is that of the capitalist as well as that of the labourer. If labour has nothing to labour on, it is the owner of capital, a capitalist labourer, on whom the simple labourer will depend for work. But then the capitalist ought to gain, while the labourer will get his wages in return for his work on the capitalist's stock. Hume, however, in order to maintain the status quo and to avoid justifying any social unrest, rejected equalitarian principles; but like Aristotle, he recommends

83. Ibid, p. 196.

84. Ibid, p. 195.

some measure of equality, and states:

It will not, I hope, be considered as a superfluous digression, if I here observe, that as the multitude of mechanical arts is advantageous, so is the great number of persons to whose share the production of these arts falls. A too great disproportion among the citizens weakens any state. Every person, if possible, ought to enjoy the fruits of his labour, in a full possession of all the necessaries, and many of the conveniences of life. No one can doubt but such an equality is most suitable to human nature, and diminishes much less from the happiness of the rich, than it adds to that of the poor. It also augments the power of the state, and makes any extra-ordinary taxes or impositions be paid with more cheerfulness. Where the riches are engrossed by a few, these must contribute very largely to the supplying of public necessities, but when the riches are dispersed among multitudes, the burden feels light on every shoulder, and the taxes make not a very sensible difference on any one's way of living.

Add to this, that where the riches are in few hands, these must enjoy all the powers, and will readily conspire to lay the whole burden on the poor, and oppress them still further, to the discouragement of all industry.

Men must have profits proportionable to their expense and hazard. Where so considerable a number of the labouring poor, as the peasants and farmers, are in very low 85 circumstances, all the rest must partake of their poverty.

Hume like Locke⁸⁶ suggests that every person should be in the full possession of all the necessaries and many of the conveniences of life. The welfare of the state is in the proper distribution of wealth. Thus one can conclude that according to Hume there should be no propertyless person in the state because the distribution of wealth

85. Hume, D., Essays, Moral, Political and Literary, London 1963, pp. 271-273.

86. Locke in his Letters Concerning Toleration states:

For the political society is instituted for no other end, but only to secure every man's possession of the things of this life.

Locke, op.cit., p. 153.

according to the fruits of labour is in the interest of the state. But Hume did not reach the conclusion of his own theory because he also states that the poverty of the common people is a natural phenomenon.⁸⁷ Second, his plea for reduction of taxes on the poor so that they do not fall on the necessities of life, is not derived directly from his theory for justification of property, but is presented as a desirable provision of positive law which would encourage more work and industry. Third, Hume contradicts his own plea for a tendency towards equality by stating that long possession is a just title to property, even though he clearly realised and openly stated that the first occupation was often usurpation and based on fraud. In fact his insistence that experience gained with the growth of commerce and industry would strengthen the humanitarian forces and would lead to profits proportionate to the fruits of labour, prevented him from reaching the logical implications of his theory for practical purposes. As he states:

Industry, knowledge, and humanity, are linked together by an indissoluble chain, and are found from experience as well as reason to be peculiar to the more polished, and what are commonly denominated, the more luxurious ages.⁸⁸

But the humanitarianism of which Hume speaks as accompanying the development of commerce and industry is a wish in vain.

Bentham agrees with Hume that some measure of equality would provide the greatest happiness though both are antipathetic to equality at the cost of security. As Hume (substantially followed by Bentham)

87. Hume, Essays, op.cit., p. 272.

88. Hume, Essays, op.cit., p. 276.

states:

The safety of the people is the supreme law: All other particular laws are subordinate to it, and dependent on it: ...

... all questions of property are subordinate to the authority of civil laws, which extend, restrain, modify, and alter the rules of natural justice, according to the particular convenience of each community.⁸⁹

Both are busy in protecting the status quo by insisting that the present distribution of wealth is to be maintained, they might indeed have it in mind, in allowing for a measure of equality, to maintain the property-less people at a level at which they would remain 'middle of the road' thus more readily accepting the existing distribution of property, and therefore the security of actual property holders. This was a measure devised for preserving security, giving to the poor people, to keep their spirits up, hope of equality and of catching up with the wealthy people. As Bentham says:

The industry and the labour of the poor place them among the candidates of fortune.⁹⁰

This was also a measure to keep the wages low as Bentham states:

The attraction of pleasure; the succession of wants; the active desire of increasing happiness, will procure unceasingly, under the reign of security, new efforts towards new acquisitions.⁹¹

Bentham while insisting on security as the principal object of law⁹² expresses his urge for equality and states:

89. Hume, op.cit., p. 195.

90. Bentham, J , Theory of Legislation, London 1876, p. 114.

91. Ibid, p. 101.

92. Ibid, p. 109.

The nearer the actual proportion approaches to equality, the greater will be the total mass of happiness.⁹³

He further states:

When property by the death of the proprietor ceases to have an owner, the law can interfere in its distribution, either by limiting in certain respects the testamentary power, in order to prevent too great an accumulation of wealth in the hands of an individual; or by regulating the succession in favour of equality in cases where the deceased has left no consort, nor relation in the direct line, and has made no will. The question then relates to new acquirers who have formed no expectations; and equality⁹⁴ may do what is best for all without disappointing any.

Bentham's means of reaching equality by waiting to see whether a man leaves his property without making a will, or dies without leaving any heir, is too remote a possibility and in every-day experience is very rare. He favours the free play of property and hopes that with the passage of time the equalities will follow automatically. Thus despite his sympathies for equality the means he envisaged were too remote to be of any practical value and ignored social actualities. This is because of his obsession with security,⁹⁵ and because of his failure to make a distinction between the positive and normative aspect of property free from his principle of security.

Bentham states that equality is one of the aims of the principle of utility and it would in fact result from the operation of laws framed

93. Ibid, p. 104.

94. Ibid, p. 122.

95. Bentham states:

Equality ought not to be favoured except in the cases in which it does not interfere with security.

Ibid, p. 99.

on that principle. Equality of wealth will produce happiness only if there is wealth to equalise. If one goes on equalising wealth at fixed periods of time, the time will come when there would be nothing to equalise. He states:

If all property were equally divided, at fixed periods, the sure and certain consequence would be, that presently there would be ⁹⁶no property to divide. All would shortly be destroyed.

Equality of wealth will not produce happiness, if there is no wealth to equalise. The legislators must first make sure that men will work and produce. Bentham, like Hume, asserts that in order to incite men to work the law ought to secure to each man the results of his labour. Locke also reached the same conclusion in his theory of labour. Bentham says:

In legislation, the most important object is security. Though no laws were made directly for subsistence, it might easily be imagined that no one would neglect it. But unless laws are made directly for security, it would be quite ~~useless~~ to make them for subsistence. You may order production; you may command cultivation; and you will have done nothing. But assure to the cultivator the fruits of his industry⁹⁷, and perhaps in that alone you will have done enough.

Bentham admits that law is to secure to the producer the product of his industry, but from this he draws no conclusion that to reduce inequalities of wealth, property ought to be redistributed. In this he violates his own principle of utility - the nearer the actual proportion approaches to equality, the greater will be the total mass

96. Ibid, p. 99.

97. Ibid, p. 98.

of happiness.⁹⁸ He left this flaw in his theory due to two reasons. First, he was too much occupied by his principle of security. Second, there is an ambiguity in his principle of utility.

Bentham states that the legislators have one end in view in distributing rights and obligations and that is to promote the happiness of the individual. And the happiness of the individual consists in subsistence, equality, abundance, and security. Of these four ends Bentham's maximum stress is on security,⁹⁹ so much so that he ignores others. Without security, he believes that there is no happiness. It is because of his stress on security that he abandons even subsistence

98. Ibid, p. 104.

99. Cohen states:

It is undoubtedly for the general good to obviate as much as possible the effect of economic shock to a large number of people. The routine of life prospers on security. But when that security contains a large element of injustice the shock of an economic operation by law may be necessary and ethically justified.

Cohen, M.R., Law and the Social Order, New York 1933, p. 61.

Stone, while commenting on Bentham's principle of security as a paramount element in the administration of law, states:

What, for instance, did he mean by "security", and in what sense could it be said that "security" is paramount over "subsistence"? In terms of the individual life man may live without security, but he cannot live without subsistence. If by security he had reference to a collective state then it may indeed be true that security may exist for some or even for many, even if subsistence is lacking for some or even for many. But if that is his meaning he must have permitted the entry of extraneous factors into his egalitarian calculus of individual pains and pleasures. Moreover, of course the modern tendency is to deny that, in the long run at any rate, security (i.e. social stability) can be achieved except on the basis of subsistence for substantially all individuals.

Stone, J., The Province and Function of Law, London 1947, p. 286.

which is the economic basis of the institution of property. Private property exists and survives as an institution first and supremely because it makes provision for the necessities of human society. In his eagerness to avoid the radical conclusions of his theory of right of the labourer to the whole produce of labour, he concluded that any system of secure ownership, even one which did not award things to their creator, was inviolate. As he says:

He [the legislator] ought to maintain the distribution as it is actually established. It is this which, under the name of justice, is regarded as his first duty. This is a general and simple rule, which applies itself to all states; and which adapts itself to all places, even those of the most opposite character. There is nothing more different than the state of property in America, in England, in Hungary, and in Russia. Generally, in the first of these countries, the cultivator is a proprietor; in the second, a tenant; in the third, attached to the glebe; in the fourth a slave. However, the supreme principle of security commands the preservation of all these distributions, though their nature is so different, and though they do not produce the same sum of happiness.¹⁰⁰

Bentham in rejecting equality as the basis of property repeats the arguments of Hume and states:

If equality ought to prevail to-day it ought to prevail always. Yet it cannot be preserved except by renewing the violence by which it was established. It will need an army of inquisitors and executioners as deaf to favour as to pity; insensible to the seductions of pleasure; inaccessible to personal interest; endowed with all the virtues, though in a service which destroys them all. The levelling apparatus ought to go incessantly backward and forward, cutting off all that rises above the line prescribed. A ceaseless vigilance would be necessary to give to those who had dissipated their portion, and to take from those who by labour had augmented theirs. In such an order of things there would be only one wise course for the governed, - that of prodigality; there would be but one foolish course, - that of industry. This pretended remedy, seemingly so

100. Ibid, p. 119.

pleasant, would be a mortal poison, a burning cautery, which would consume till it destroyed the last fibre of life. The hostile sword in its greatest furies is a thousand times less dreadful. It inflicts but partial evils, which time effaces and industry repairs.

Can an individual be happy if he lacks the means of subsistence, or if he has resources which are inadequate or insufficient for human life? Security is necessary to protect subsistence, but security for some at the cost of subsistence for others cannot promote happiness; and if there is no subsistence, there is no need of security. Security as a principle of utility leads to happiness only if it secures to each the means of subsistence. The human race must live. It will adopt those institutions which are most liable to preserve and perpetuate its existence. The institution of private property exists and survives because it provides the means of subsistence. Its most basic justification is that it secures to owners of property at least the means of their subsistence which they control independently of interference by others. The problem is that the mere existence of an institution of private property does not necessarily guarantee that to everyone. Aristotle realised this and insists on providing secure subsistence for all citizens in order to avoid anarchy. If social institutions guarantee inviolability of the person, they must also guarantee security of subsistence which is necessary for social existence. Nero put six people to death in Roman Africa not because there was any danger to security but because the wealth possessed by them was so disproportionate that it deprived others of subsistence and the evil was becoming so incurable that it

101. Ibid, pp. 120-121.

might lead to anarchy. Security comes to protect property and this leads to happiness. But security will lead to happiness only if there is property to protect. It means there is no happiness if there is no property.

Bentham defines utility thus:

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question, or what is the same thing in other words, to promote or to oppose that happiness. ^{F02}

The principle of utility guides one in the approval of actions if they lead to happiness and disapproval of actions if they oppose happiness. Happiness is thus intrinsically good and whatever opposes happiness is intrinsically bad. The meaning of the principle of utility becomes clear when Bentham says that

by utility is meant that property in any object whereby it tends to promote benefit, pleasure, good, or happiness, all this in the present case comes to the same thing, or what again comes to the same thing, to prevent the happening of mischief, pain, evil, or unhappiness, to the party whose interest is considered. ^{F03}

In deciding about the interest, the party whose interest is considered, is the individual, as a social unit. Bentham says:

A thing is said to promote the interest, or to be for the interest of an individual when it tends to add to the sum total of his pleasures, or what comes to the same thing, to diminish the sum total of his pains. ¹⁰⁴

102. An Introduction to the Principles of Morals and Legislation, ed. J.H. Burns and H.L.A. Hart, London 1970, pp.11-12.

103. Ibid, p. 12.

104. Ibid, p. 12.

Regarding society he states:

The community is a fictitious body composed of the individual persons who are considered as constituting, as it were, its members.¹⁰⁵

What interest is focused on the individual, society is considered as a system of mechanical and external alliance. The right of property becomes one exclusively pertaining to individuals, having its source in the individual not as a member of society but as a unit. Such a view will lead Bentham to concede to Locke's idea of property as a natural right, though through his utilitarian principles. The rights will be the rights of the individual, not as a member of the society but as a unit which composes the society which is an aggregate of these units, and will be accepted or rejected by him not for social considerations but for his ego-centric pleasure or happiness. The ideal will be that an action is good not because it is socially advantageous but good because it is advantageous to the individual. Bentham stresses the development of society through individuals and not the development of individuals through society. His is an attempt to discredit objective criteria and substitute subjective standards. It is the business of society to maintain and make effective the right of property, but it has no power to modify and control the right. Of course this is not the intention of Bentham. But given his premises the conclusion is unavoidable, because of society being considered as an organic whole, the units comprising it

will be inseparable aspects of a complex whole, neither one coming first nor standing above the other; but,

105. Ibid, p. 12.

through the conscious interaction of individuals, the one will be seen in the many, and the many in the one.¹⁰⁶

and on that hypothesis it is possible to maintain and harmonise rights, in other words, to maintain harmonisable rights. The principle of utility will direct property for the convenience of society. In such a case the result will be increase of total happiness, rather than the happiness of

the individual agent, for that would make the principle of utility nothing but the principle of enlightened self-interest and not, as Bentham intended it to be, the fundamental principle of morality.¹⁰⁷

Bentham intends adoption of the principle of utility to augment the happiness of the community, and states:

An action then may be said to be conformable to the principle of utility or for shortness's sake to utility, meaning with respect to the community at large, when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.¹⁰⁸

It was due to Bentham's inability to see society as an entity in which

the life of each citizen is not regarded as limited by birth and death; it is but a continuation of the existence of his forefathers, and it will be prolonged in the existence of his descendants,¹⁰⁹

that the interest of the individual appears to him as separately existing not as an organic interest but as if it were a shareholder's interest in a limited company. An action that would augment the interest of society

106. Haney, L.H., "The Social Point of View in Economics", 28 Q.J.E., 1913, p. 128.

107. Bentham and Legal Theory, ed. James, M.H., Belfast 1973, p.11.

108. An Introduction to the Principles of Morals & Legislation, op.cit., p. 12.

109. Maine, Ancient Law, London 1880, p. 258.

is the action of its individual members taken together against the action of those whose acts are diminishing utility - the principle which gives Bentham his quantitative variables comparable to physics. But when this principle read with his theory of society as an aggregate of individuals is applied to private property, it means that the greatest number of individuals having property would mean greatest happiness and this leads according to Bentham to the greatest dispersion of property, which would lead to ultimate equality. But Bentham shuns this conclusion and avoids the full implications of his theory. Instead he declares that equality is not to be preferred to security because it would threaten the institution of private property; thus he nullified his own principle of utility.

Whether under the natural right theory of Locke or the utilitarianism of Bentham, it is agreed that producer is the rightful owner of the produce. The utilitarianism of Bentham rejects natural rights because of their metaphysical basis, but he accepts the practical conclusions which natural right theory sustains. Their conclusions are the same though they employ different means. They all give support to the doctrine of Adam Smith as he states:

The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable.¹¹⁰

All these thinkers discussed above repeat the idea, first, of the right of the individual to acquire property, and second, the right of

110. Smith, A., op.cit., vol. i, p. 126.

the labourer to the produce of his labour. But as soon as we admit that one man's ^{labour} may belong to another, even in the case of the contract of employment, we have radically transformed the original simplicity of the theory. The owner of capital owns the fruits of the labour of others, which does not seem justifiable on the original premises of the labour theory. The idea expressed by Locke¹¹¹ that it is labour indeed that puts the difference of value on everything, is carried on by others, but in practice it is labour that gets the minimum as Adam Smith states:

As soon as land becomes private property, the landlord demands a share of almost all the produce which the labourer can either raise, or collect from it. His rent makes the first deduction from¹¹² the produce of the labour which is employed on land.

Since the period of industrial growth and capital accumulation the theories that made headway in practice through these thinkers, were those that recommended the low wages so as to give an incentive to the labourer to work hard to earn his living. This is a theory of social expediency rather than of justice and it reversed the very conception of private property as subordinate to human needs. Appropriation became separate from labour. In fact the idea that prevailed was the protection of property rather than labour, and Montesquieu's remarks triumphed

When the rich diminish their expenditures, the poor die of hunger.¹¹³

111. Locke, op.cit., p. 26.

112. Smith, op.cit., p. 66.

113. Quoted in Moran, T.F., "The Ethics of Wealth", The American Journal of Sociology, 1901, p. 832.

A similar remark was made by Adam Smith when he states - those who live by rent are inseparably connected with the general interest of society.¹¹⁴ The emphasis was on the subordination of the use of property to the right of ownership rather than of the right of ownership to the use of property. No one declared that human needs should be the first charge on industry in an age when many workers had no definite property in anything but their labour. In fact the rationale of private property was lost in the desire to find the mode or ways by which property was acquired and the sense of equality and social purposiveness lost ground to preserving existing inequalities in the name of maintaining security. Property as an institution lost its essential justifying merit at the very hands of those who themselves found its origin in human and social needs and started welcoming its existence in a law of property, of which it could justly be said that :

our present law of property, which centres in private possession, does not, in the first place, guarantee to the labourer the whole product of his labour. By assigning the existing objects of wealth, and especially the instruments of production, to individuals to use at their pleasure, our law of property invests such individuals with an ascendancy, by virtue of which without any labour of their own, they draw an unearned income which they can apply to the satisfaction of their wants. This income, for which the legally-favoured recipients return no personal equivalent to society.¹¹⁵

The justification of private property on utility is not an ideal solution. The utilitarian version of the institution of property may be ideal under particular conditions and at particular times but might be

114. Smith, A., op.cit., p. 263.

115. Menger, A., The Right to the Whole Produce of Labour, trans. Tanner, M.E., London 1899, pp. 2-3. *

unsatisfactory under other conditions. There is a struggle on the part of human race for its own life and preservation which in the long run is determined by economic institutions. The institution of property based on the economic needs of society under whatever conditions and circumstances would be an ideal solution. To treat the institution of property as based on the right of subsistence is to my mind the best solution of the problem of justification. The control of the individual over property for his well-being and development (over those things which are necessary in the circumstances) is the guide to the justification of private property. This includes all those forms of property which in a given society are necessary for individual's social life and turns property natural because of the physical and moral limits provided by the conditions in a given society. Thus the justification of private property is not to be found in any utilitarian criterion, but in the need of the institution of property for each individual's living. Property in the simplest conditions of society would be based on this criterion. Even a slave, whose owner is intelligent enough, would grant him right of property on this criterion of subsistence. Hobson, while expressing his feelings about right of life, states:

"The right to life" is not a foolish or a useless phrase. It implies a recognition that it is the supreme duty of society to secure the life of all serviceable members, together with an implication that the life of every member shall be deemed serviceable, unless known to be otherwise. So there is a clear individual right to property in all "necessaries" of life implied in the right to life, for "you do take my life when you do take the means by which I live."¹¹⁶

116. Hobson, J.A., op.cit., pp. 89-90.

Aristotle suggests that wealth should be sought as a basis for livelihood. The true basis of property is as a means of supplying the needs of human existence.¹¹⁷

117. Aristotle, T.H.F., Politics, Penguin Books, 1968, Book I, Ch. 8.

CHAPTER V

Justification of Private Property (Contd.)THE SOCIALIST CRITIQUE OF PRIVATE PROPERTY

The approach of the classical liberal writers representing both natural right and utilitarian philosophy as justifications of the institution of property clearly demonstrate adherence to the idea that social stability must be maintained even at the cost of injustice in relation to the distribution of property and existing inequalities. The organisation of the working classes, and the development of the socialist theories attacked these inequalities with a view to securing justice for the working classes by limiting the institution of property to the function of meeting personal needs of each individual. In recognising that the classical theorists did not advocate distribution or redistribution of property in accordance with their own labour theory and that they avoided the logical conclusions of their own theory in their actual social context the socialist writers insisted on taking that theory to its logical conclusion, viz. that labour ought to be the sole owner of the fruits of labour.

The common basis of these socialist theories consists mainly of that strain of natural law thinking which lays down the labour theory of property. By reference to that theory of property, the socialist writers claimed the right of the labourer to his whole product. In advocating this theory the socialist writers argue that the present system of private property, which the classical writers support, deprives a labourer of the product of his labour and hands it over to the capitalist. They argue

that such a system of private property is ethically wrong since under its sway the labouring masses, the majority of the people, are condemned to misery. Nor can such a system of private property lead to any real social stability or security, for the produce of the labour is not secured to the labourer, but is taken away from him by the capitalist.

In the context of this type of socialist theory, a critique of the labour theory must focus on the question whether such a right can even in principle be fully realised. If not, how can the institution of property be modified to meet the aspirations of the working people, and to restore it to its primary basis as an institution for meeting the economic needs of each individual? In answering this second question we shall review the ways in which criticism of the implications of the labour theory within the socialist tradition enables it to be transcended.

Property in Socialist Thought

Even as classical liberal theorising was reaching its finest flowering towards the end of the 18th century and during the 19th century, there were already movements in thought aimed at radically reorganising society. Certain thinkers of that period started with a searching criticism of the existing economic conditions which led them to propound schemes for the reconstruction of the actual right of property. This movement for economic reconstruction of the law of property (and much else) came to be known as socialist thought. Property regulates economic life and thus the satisfaction of the needs of human life. The law of property on that view must be defective if it does not secure to each individual the economic means for the satisfaction of his needs.

The main theme of these earlier socialist thinkers is the same as that of natural lawyers - that a man has no right to any property save that which is the fruit of his labour. In a simple form it is stated as - labour's right to the whole produce of labour.

Another question which (as we saw) necessarily arises on this hypothesis is that concerning the regulation and exercise of this right to the whole produce of labour. Locke states that an individual in an act of appropriation must take care as to leave enough for others. Thus the right of an individual to the whole produce of his labour is restricted not only by his own needs but also by the needs of others. But only where an individual lives in a state of nature and has abundance at his disposal is such a right a possibility. In modern society where production is co-operative, two difficulties arise. First, a man cannot point out to a particular share as having been produced by him alone. Second, the needs of an individual form a part of the large perspective of the society in which he lives. Locke's theory is based on the state of society where things are in abundance and it is a question of pick and choose. Thus even if Locke's principle that fruits of labour are the product of the labourer still holds good, the distribution of the fruits on that principle is not practically workable in the modern productive system. Bentham's principle of utility in the distribution of the fruits of labour does not take into consideration the economic needs of the community, but is an ego-centric principle. These socialist thinkers have realised all these difficulties and tried to solve the problem through reference to a wider perspective.

From a sociological and historical point of view, the conditions of the last half of the 18th century (which saw the improvement in agriculture and the rapid rate of enclosure movements in England and other European countries leading to a large private land holdings) attracted the attention of many reformers towards agrarian reforms. Thomas Spence advocated that property in land be made common property in which each native of the land has an equal right,

with free liberty to sustain himself and family with the animals, fruits and other products thereof. Thus such a people reap jointly the whole advantages of their country, or neighbourhood, without having their right in so doing called in question by any ... to deny them that right is in effect denying them a right to live.

He feared that unless this right were reorganized, acceptance of the principle of the natural right of the labourer to the whole produce of his labour would give the landowners an excuse to deprive anyone from property in land since they could claim property in the land as the produce of their labour. He states:

Were all the landholders to be of one mind, and determined to take their properties into their own hands, all the rest of mankind might go to heaven if they would, for there would be no place found for them here ... And those land-makers, as we shall call them, justify all this by the practice of other manufacturers, who take all they can get for the products of their hands; and because that everyone ought to live by his business as well as he can, and consequently so ought the land-makers.

He thus argues that the natural conditions ought to be restored, and that the local parishes should distribute equal shares of land to people on rent, thus establishing a fund which will be employed to maintain those

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1. Spence, T., The Real Rights of Man, in The Pioneers of Land Reform, edited by Beer, M., London 1920, pp. 5-6.
 2. Ibid p. 9.

who are unfit to work or cannot find work and to meet other government expenses.³

A similar view is expressed by Ogilvie against landed monopoly when he states:

All right of property is founded either in occupancy or labour. The earth having been given to mankind in common occupancy, each individual seems to have by nature a right to possess and cultivate an equal share ...

No individual can derive from this general right of occupancy a title to any more than an equal share of the soil of his country. His actual possession of more cannot of right preclude the claim of any other person who is not already possessed of such equal share.⁴

He pleads for the equal share of property in land as a birth right, limited only by the equal share of others, and the right of the farmer to the full produce of the soil on which he is to exercise his industry.⁵ This will accommodate both the original right of universal occupancy and the acquired rights of labour.⁶ For the purpose of carrying out his plan Ogilvie suggests the letting of land on fixed rent for a term of one's life.

Paine states:

There could be no such things as landed property originally. Man did not make the earth, and, though he had a natural right to occupy it, he had no right to locate as his property in perpetuity any part of it.

3. Ibid p. 11.

4. Ogilvie, W., The Right of Property in Land, in The Pioneers of Land Reform, edited by Beer, M., London 1920, pp. 33-35.

5. Ibid p. 53.

6. Ibid p. 54.

7. Paine, T. Agrarian Justice, in The Pioneers of Land Reform, edited by Beer, M., London 1920, p. 184.

Paine argues that it is improvement and cultivation that makes land the property of the cultivator, while the ground itself belongs to all. Paine, like Spence and Ogilvie, suggests the payment of ground rent to the community by the cultivators, in an attempt to balance the improver's and the community's right.

The ideas of these thinkers are based on natural law theories and the utilitarian principle of maximising happiness. Like Locke they maintain that in a state of nature the earth is given to mankind in common and labour is the basis of private property. But they do not believe in historical titles to property in land which exclude those who are landless. By no provision of positive law can the natural right of man be altered. Thus they reject all types of monopolies in land. They agree that the natural right to the whole produce of labour is nullified if all the things to be worked upon belong to somebody else. Land is to be kept in common as it is not the product of labour; men should only acquire the fruits of their labour.

Both these principles, the right to life and the right to the whole produce of labour, as the basis of the institution of property, are irreconcilable. Since everybody, whether fit to labour or not, has a right to life, then to base property on the right of labour is to deprive some of the means to support life. Again in the industrial production, the right to the whole produce of labour cannot be realised. Since all production is social, no one can claim to a specific part of production for himself. Even a man who has no part to play in the operation of a machine in the factory contributes to the production process. For

example, a police constable who just maintains orderly behaviour and keeps watch outside the factory cannot be ruled out as an agent in the production process. For it is not dependence of A on B, but the interdependence of A and B that rules production in modern times. The idea of creating a 'fund' to provide for those who could not work, as suggested by these thinkers, did not create a right of property but a different species of right, whereby it becomes the duty of state to maintain them.

Godwin, however, tried to base the right of property both on labour and on the satisfaction of needs. He ascribes all evils of society like selfishness, oppression, fraud, etc. to the classical conception of property which supports accumulation irrespective of needs and personal labour. He states:

No sooner is accumulation introduced, than they begin to study a variety of methods for disposing of their superfluity with least emolument to their neighbour, or in other words by which it shall appear to be most their own. They do not long continue to buy commodities, before they begin to buy men. He that possesses or is the spectator of superfluity soon discovers the hold which it affords us on the minds of others. Hence the passions of vanity and ostentation. Hence the despotic manners of them who recollect with complacence the rank they occupy, and the restless ambition of those whose attention is engrossed by the possible future.

While rejecting all monopolistic ideas Godwin suggests that land, the chief instrument of production, should be in the hands of those who are willing to cultivate themselves. But a society where a man after unceasing toil returns to his family famished with hunger, exposed half naked to the inclemencies of the sky makes him like a brute machine in the hands

8. Godwin's Political Justice, A reprint of The Essays on 'Property', edited by Salt, H.S., London 1890, pp. 60-61.

of monopolist; in such circumstances the real cultivator is deprived of the means and the results of labour. He is against all types of monopolies⁹ and succession¹⁰ which lead to the accumulation of wealth, with these consequential evils.

In his view no appropriation, even of a man's own products¹¹ can be authorised beyond a man's need since other men have also to satisfy their needs. For he asserts that all men could afford to live well and happily sharing the fruits of their combined labour.¹² His main concern is not to make property collective but to build a system of private property which enables everyone to satisfy his needs. He states:

I have an hundred loaves in my possession, and in the next street there is a poor man expiring with hunger, to whom one of these loaves would be the means of preserving his life. If I withhold this loaf from him, am I not unjust? If I impart it, am I not complying with what justice demands? To whom does the loaf justly belong? ...

If justice have any meaning, nothing can be more iniquitous, than for one man to possess superfluities, while there is a human being in existence that is not adequately supplied with these.

Justice does not stop here. Every man is entitled, so far as the general stock will suffice, not only to the means of being, but of well being.¹³

9. Ibid p. 57.

10. Ibid pp. 53-54.

11. Ibid p. 43.

Babeuf expresses a similar view as to distribution of property.

Gray, Alexander, The Socialist Tradition Moses to Lenin, London 1946, p. 104.

12. Godwin, op.cit., pp. 111-112.

13. Ibid pp. 38-39.

The standard of how much may be possessed is thus the wants of the individual, and anyone who accumulates property disproportionate to his needs is guilty of fraud and robbery and thus does injustice to his fellows. To correct these inequalities in the institution of property, he appeals to reason. Reason, he believes, is an infallible guide to truth and goodness, implanted in all men, though overshadowed in existing societies by irrational conventions and coercive practices. By this method, he states:

The word property would probably remain; its signification only would be modified. The mistake does not so properly lie in the idea itself, as in the source from which it is traced. What I have, if it be necessary for my use, is truly mine; what I have, though the fruit of my own industry¹⁴ if unnecessary, it is an usurpation for me to retain.

Thus Godwin does not adhere to the idea of right of labour to the whole produce of labour, but insists on labour as the basis of property with the distribution of the products of labour limited according to needs. Though it is true that without labour, which is the means of producing wealth, there will be nothing to distribute, yet his idea is that if a man has produced more than his needs require, this extra becomes communal property. But this does not offer any solution to the basis of the institution of property except implicitly admitting that all property should be communal. Godwin's solution lies in proposing a criterion for the order of property in which all should live like ascetics rather than renaissance princes. His criterion poses an abundance of material from which everyone draws according to his needs - but when

14. Ibid p. 110.

nothing is left those who thus could not draw must somehow live without property. He did not presume that production is a social process but his individualistic attitude to production makes the application of his principle difficult. In fact he is too much dependent on his idea of human rationality and his sense of idealism. To make all property communal is no solution to the just distribution of property, if that means securing, that the needs of each individual are served.

The idea of securing a just distribution of property, by restoring to the labourer the product of his industry, found further allies in a similar idealistic movement in favour of workers cooperatives. Robert Owen in Britain, Saint-Simon, Fourier, and Louis Blanc in France, and Lassalle in Germany were the protagonists of this movement.

Owen, like the agrarian radicals, traces the misery of the poor people to the violation of natural right and attacks private property in land. Under the new circumstances of industrial development he broadened his attack to cover the ownership of capital as well. But the initial theory of labour and labourer's right to the product of his industry remained unchanged. He states:

They have created an aggregate of wealth, and placed it in the hands of a few, who, by its aid, continue to absorb the wealth produced by the industry of the many. Thus the mass of the population are become mere slaves to the ignorance and caprice of these monopolists.¹⁵

To give the labourer the right to the whole produce of his labour, Owen suggests that the standard of exchange should be labour value and states:

15. Owen, R., Report to the County of Lanark, in A New View of Society and Other Writings, edited by Cole, G.D.H., London 1927, p. 258.

Of this new wealth, so created, the labourer who produces it is justly entitled to his fair proportion; and the best interests of every community require that the producer should have a fair and fixed proportion of all the wealth which he creates. This can be assigned to him on no other principle than by forming arrangements by which the natural standard of value shall become the practical standard of value. To make labour the standard of value it is necessary to ascertain the amount of it in all articles to be bought and sold.¹⁶

Owen advocates that the conflict of interests between rich and poor cannot be solved by any violent desire to dispossess the rich of their riches, because this will not remove the jealousy and hostile feelings; it can be solved only by the change of human character by moral education and change of circumstances.¹⁷ The path to progress lies in improving and changing men's circumstances so that they can learn to act together and sense the error in valuing only individual exertions and separate interests. Owen rejects the view of liberal classical writers and states:

From this principle of individual interest have arisen all the divisions of mankind, the endless errors and mischiefs of class, sect, party, and of national antipathies, creating the angry and malevolent passions, and all the crimes and misery¹⁸ with which the human race have been hitherto afflicted.

Owen believed that the labourer's right to the product of his industry will be restored by establishing workers cooperatives wherein they will be self-employed, self-governed, and self-supported. To establish these cooperatives he appealed to government, poor law authorities, and voluntary subscription from capitalists, all of whom

16. Ibid p. 262.

17. Ibid p. 148 (An Address to the Working Classes).

18. Ibid p. 269.

were to receive interest in return, his hope being that when they realised the virtues of such a system they would renounce their claim to it. With these worker cooperatives, communal ownership and self-satisfaction will prevail.¹⁹

Owen's scheme concerning the handicapped is open to the same objections discussed before. His principle of distribution is too idealistic and depends on the establishment of communal living. His idealism becomes clear when he says that the technique of cooperation will produce so much that there will be left no need to produce any more, since every body will be satisfied. The consequence of this will be

- The dominion of wealth, and the evils arising from the desire to acquire and accumulate riches, are on the point of terminating.²⁰

Saint-Simon's proposal to establish a just order of distribution is based on proportionality to one's labour;²¹ that is, men ought to be rewarded according to the value of labour they perform. To establish such an order, he believes, the means of production should be handed over to those who are best suited to organise them - he thus advocates the idea of setting up workers cooperatives. He did not visualise any conflict of capitalists' and workers' interest and holds that their interests are identical. He ignored this conflict of interest because he followed in the tradition of Owen that these apparent conflicts are due

19. Ibid pp. 268-269.

20. Cole, G.D.H., Socialist Thought 1789-1850, London 1953, vol. i, p. 94.

21. Cole, G.D.H., Socialist Thought, London 1953, vol.i, pp. 42-43.

to error of judgement; he too looks to reason for correction of this. He argues that society is under an obligation to provide work for all. Saint-Simon in fact like Owen is led by his desire to establish a collectively planned society, and he too fails to provide a sound criterion for the justification of property. His principle of distribution according to one's labour will lead to more inequalities rather than reducing inequalities because of differences of labour and labour conditions. But his initial criterion, in fact, is a prelude to the establishment of collective communities.

A similar plan for workers cooperatives was devised by Fourier. But Fourier suggests the setting up of these cooperatives by voluntary associations as modern private corporations. He suggests that in these corporations workers will be shareholders to the extent of their capital investment as well as drawing wages according to their labour.²² But his fear that the return of interest on workers' capital will lead to accumulation of unearned income led him to devise a diminishing rate of interest as the capital investment of anyone increases. Thus he did not aim at the abolition of unearned income but only as a means of keeping it in check. His scheme is no better than that of Saint-Simon.

Gray contends that Louis Blanc represents a transition from the utopian socialism of Owen, Saint-Simon, and Fourier (which ends up in an ideal of communal living) to proletarian socialism and says:

Doubtless, with Fourier and Owen, he is an 'associationist', but the form of association at which he

22. Ibid pp. 66-67.

aims has a more modern flavour; nor is it expected that some generous millionaire will by his touch heal and renew this putrescent world.²³

Louis Blanc contends that a strong state is needed to protect the interest of the workers. He advocates that the state set up 'social workshops' and give them into the charge of the workers, who by their own elected representatives will run the social workshops. He argues for industrial democracy as well as for political democracy and favours giving voting rights to all the people so that they make the state strong by backing up the state. He argues that the social workshops will compete with the private enterprise. The sheer weight of state regulations and state help for 'social workshops' will lead to the disappearance of private enterprise. This will be an end of competition which is the source of all evils. Since all these organisations will be in the hands of the workers, Louis Blanc, in the tradition of Godwin and Owen, maintains that the anti-social attitudes and egotism from which the world suffers will be cured by the rise of a higher morality in the workers. The net profit of these workshops will be divided into three parts - one part in equal proportion will be divided among the workers, the second will go for the help of handicapped, and the third will be for reinvestment in the industry.²⁴ At the same time Louis Blanc does not object if an employer retires into private life as a debenture holder - thus he violates his own principle of labour as a basis of property. In fact like all other thinkers discussed already he takes refuge in the

23. Gray, A., The Socialist Tradition, London 1946, p. 219.

24. Ibid p. 225.

idea of vesting all property in the state and in effect assuming that everyone can live in a communistic cell²⁵ without providing any basis for the justification of the institution of property.

In Germany Lassalle advocated the idea of national workshops similar to Louis Blanc. He contends that by the establishment of national workshops, labour will be enabled to receive as its reward the whole produce of labour. This will give the workers the right to work and the enjoyment of the full product of their labour.²⁶ In this way the distinction between wages and profit disappears, as indeed does the conception of wages itself.²⁷ Here again he drags his theory into corporate property which does not suggest any justification of the institution of property. Moreover any idea relating to the right of the labour to the produce of his industry as the basis of distribution will produce more inequalities instead of reducing them because of differences in labour and labour conditions.

Despite all their differences the thinkers of the cooperative movement were trying to avoid the free competition of laissez faire between man and man for the means of existence which according to them is not a sound principle of social order. The real producers should conduct their own social affairs by becoming masters of their own product. A cooperative system, they hold, would avoid competitive patterns of behaviour, but in the end with their aim of solving the problem of conflict

25. Cole, op.cit., vol. i, p. 171.

26. Ibid vol. ii, p. 79.

27. Gray, op.cit., p. 339.

between the claims of justice and the claims of labour, they end up in advocating communal living.

The labour theory as originally propounded by Locke began to lose ground when taken to its logical conclusions. The justification of private property as based on labour remained the ground both of natural right philosophers and socialist thinkers. For the socialists it remained an article of faith that the labourer should receive the full award of his labour. Though both classical economists and socialist thinkers started with the identical premises that all value in exchange is derived from labour, from this the socialist thinkers have drawn the juridical inference that whosoever has created this value is the owner of it. The capitalist's justification of private property is at present based on liberty²⁸ necessary for the development of human personality and foresight.²⁹ This line of argument, which defends the right of private property as a necessary consequence of the claims of liberty is logical only in appearance because the contract between the capitalist and the labourer is not voluntary but based on the state of coercion which derives its sanction from the wealth of the capitalist, which leaves the labourer no choice. Hall expresses the reality of that relation in the following terms:

28. Cf. Hayek, F., The Road to Serfdom, London 1944.

29. It is argued that private property is necessary for foresight and deliberation. So one's control over one's wealth is necessary. But this is not true in the case of modern corporations because of the divorce between ownership and control. This implies that control of wealth does not imply foresight and deliberation. As in the case of corporations so is the case of public ownership.

If you will labour for me in such and such a way,
I will give you out of those things such as you stand in
need of; but unless you will do these things which I
require of you, you shall have none of them.

Such an approach fails to take into account the fact that the work of preserving the produce and results of individual labour falls into society itself. The individual cannot claim a never-ending return from society for work accomplished in the limited space of his life time. The works of social order are not only his preserve but the never ending contribution of many generations. It is impossible for an individual to acquire private property without the aid of society. Paine refers to the paradox of individual production and states:

Separate an individual from society, and give him an island or a continent to possess, and he cannot acquire personal property. He cannot become rich. So inseparably are the means connected with the end, in all cases, that where the former do not exist, the latter cannot be obtained.

The capitalist systems failed to justify capitalist property on any natural right of property - especially in so far as they assured the right of the labourer to his produce. In modern times no further developments in the conception of property can be based on such natural right theories.

Hall attacks, but does not reject like Kant³² and Hegel³³, the natural

30. Hall, C., The Effects of Civilisation on the People in European States, London 1850, p. 44. Quoted by Gray, A., op.cit., p. 264.

31. Paine, T., op.cit., pp. 199-200.

32. Kant states that man acquires property not by mixing his labour with the external objects, but by transcendental operation of the will upon external objects. This approach does not present any difficulty in possessing landed property. Again this theory does not present any difficulty in the acquisition of unequal personal property. Justice requires that men should enjoy equal rights, but by virtue of their unequal talents they acquire unequal property to realise their fullest development.

Kant, Philosophy of Law, Edinburgh 1887, p. 92.

33. Similar views are expressed by Hegel.
Hegel, Philosophy of Right, Oxford 1971, pp. 40-45.

law interpretation of labour theory of property, and regards rents and interests as unjust appropriation on the return of labour and claims for the labourer undiminished product of his industry. He sees the real conflict of interest between the capitalist and labourer which was earlier ignored, and, keeping this conflict in view, defines wealth as that which gives power over, and commands, the labour of man: it is, therefore, power; and into that, and that only, ultimately resolvable.³⁴ He does not pose any utopian solution like Godwin, Owen, Fourier, etc., that with moral development and the rule of reason, society will grow wiser so that everybody will live in a communal society and enjoy the fruits of labour from each other. Hall is very specific in pleading for the labourer's right to the full produce of his labour. To secure to the labourer the whole produce of his labour, Hall lays down two fundamental principles.³⁵ First, every man should labour so much only as is necessary for his family, and second, each should enjoy the whole fruit of his labour. But such an approach does not solve the problem of distribution of production in modern complex industrial production and is open to the objections already discussed like that of the property rights of the handicapped. Hall is considered the pioneer in bringing to attention the existence of class conflicts.

Similarly other socialist thinkers like Thompson, Hodgskin, Rodbertus, etc., lay stress on the principle that it is labour that gives value in exchange and, therefore, it is the labourer who has a right to

34. Hall, C., Quoted by Gray, A., op.cit., p. 264.

35. Ibid, p. 268.

the produce of his labour. This in short is the main basis of their theories though they devised different means of implementing their conclusions. For example, Rodbertus, like Owen, favours the unit of labour as a standard for exchange.

To express the right of the labourer to the full produce of his labour, Proudhon stresses this conclusion of the labour theory to such an extent that he states, that the labourer even after receiving his wages still has a natural right in the object he has produced - in case of cultivation the labourer even after getting his wages leaves his labour that he has spent in making the land fertile.³⁶ That implies, then, that property is limited by reference to a social interest and is not an absolute right. Labour is the only justification of property. Proudhon explains in great detail the wrongs involved in the existence of private property, which he calls robbery and indeed tyranny, and therefore declares the capitalistic conception of private property to be indefensible.³⁷ All unearned income is nothing more than the payment made by the working classes for the mere permission to engage in productive activity. In the radical tradition, he insists that land should remain common property, and that capital, because it is created by labour, ought to belong to the labourers. Labour is the only legitimate source of all income without which land and capital produce nothing.³⁸ To establish a just order

36. Proudhon, P.J., What is Property, trans. Tucker, B.R., London 1898, ch. i.

37. Ibid, ch. iv.

38. Henry George explains the function of capital and states:

Capital does not supply the materials which labour works up into wealth, as is erroneously taught; the materials of wealth are supplied by nature. But such materials partially
(See over)

of property, Proudhon devised the thesis that industry should be based on small scale enterprises. Under small scale enterprises capital and labour are provided together by the same individuals, and there is no appropriation by a non-labourer of the surplus value created by labourers.

The theory of socialism reached its culmination in the writings of Marx who made full use of all the developments made both by the classical writers in their classical economic theories and the preliminary preparations made by other socialist writers. Even more than earlier writers he thought of labour as a cooperative effort rather than an isolated act of an individual. The fundamental idea is that ownership is derived from labour. The point is not in controversy that labour is the basis of value; it is accepted both by conservative and socialist writers. The classical economists like Adam Smith have been caught

38. (Contd. from previous page)

worked up and in the course of exchange are capital.

Capital does not supply or advance wages, as is erroneously taught. Wages are that part of the produce of his labour obtained by the labourer.

Capital does not maintain labourers during the progress of their work, as is erroneously taught. Labourers are maintained by their labour, the man who produces, in whole or in part, anything that will exchange for articles of maintenance, virtually producing that maintenance.

Capital, therefore, does not limit industry, as is erroneously taught, the only limit to industry being the access to natural material. But capital may limit the form of industry and the productiveness of industry, by limiting the use of tools and the division of labour.

George, H., Progress and Poverty, London 1932, p. 61.

in their own grip.³⁹ For them it has become as much trouble as it has been worth. If labour is the justification of private property how can it be said that the capitalist is the producer of the goods that pass into his possession? In Marx's theory it is the main theme from which he derives his theory of surplus value. He does not argue for the capitalist conception of private property but against the violation of this very principle which is accepted by the capitalists as well. Marx states:

All that we want to do away with, is the miserable character of this appropriation, under which the labourer lives merely to increase capital.⁴⁰

Ely explaining this view point states:

The foundation of the capitalistic method of production is to be found in that theft which deprived the masses of their rights in the soil, in the earth, the common heritage of all.⁴¹

Marx is following the radical interpretation of natural law writers, and holds that property rights should be based on labour. He states:

At first the rights of property seemed to us to be based on a man's own labour ... Now, however, property turns out to be the right, on the part of the capitalist, to appropriate the unpaid labour of others or its product, and to be the impossibility, on the part of the labourer, of appropriating his own product.⁴²

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39. Adam Smith regards labour as the true and original basis of property. From his theory he draws a different conclusion than that drawn by socialist writers. He does not draw the conclusion that the whole produce belongs to the labourer who produced it. Instead he states that he is free to sell it to any one he pleases. Smith, A., *Wealth of Nations*, edited by Scott, W.R., London 1925, p. 126.
40. Manifesto of the Communist Party, in Marx, K., and Engels, F., Selected Works in One Volume, London 1970, p. 48.
41. Ely, R.T., French and German Socialism in Modern Times, New York 1883, p. 181.
42. Marx, K., Capital, vol.i, London 1974, p. 547.

Applying Marx's principle of surplus value, the exchange value of an object is determined by the amount of socially necessary labour required to produce it. He used capitalist economic laws to reach the conclusion that capitalism violates its own principle by depriving labour of the product of labour. The labourers must retain their full rights in their produce and accordingly all deductions made in the name of capital must be repudiated, whether as rent, profits, or in any other form. The appropriation of capital would transfer property from the capitalist class to the workmen whose labour has created it. The new owners would hold their property as a common social product rather than in individual shares.⁴³ This will deprive no man of the power of appropriation of the products but it will deprive every one of the power to subjugate the labour of others by means of such appropriation. And Marx states:

When, therefore, capital is converted into common property, into the property of all members of society, personal property is not thereby transformed into social property. It is only the social character of the property that is changed. It loses its class character.

But how this common social product would be individually appropriated and justified is laid down by Marx in a formula which he suggested in his critique of the Gotha Programme (1875). He proposed that in the

43. Schlatter states:

Property rights can no longer be defined as a relation between the individual and the material objects which he has created; they must be defined as social rights which determine the relations of the various groups of owners and non-owners to the system of production, and prescribe what each group's share of the social product shall be.

Schlatter, R., Private Property, London 1951, p. 273.

44. Manifesto of the Communist Party, op.cit., p. 47.

first stage of the socialist society, when rent, interest, and profit had been abolished as forms of property, individuals should be rewarded according to the different values of their work measured according to its duration and intensity, or quantity and quality; ultimately he suggested, the principle of 'from each according to his ability, to each according to his needs'⁴⁵ would regulate work and distribution.

Work being universally necessary, every member of society has an equal right to a share of the product according to his needs. The product of labour belongs not to the labourer but to the whole society of workers, and is allotted to each individual according to the measure of his reasonable needs. The Marxist thus uses this labour theory of property to repudiate capitalism and to demand of the capitalists that property be owned socially as it is the product of cooperative effort in the society. As Marx states:

Capital is a collective product, and only by the united action of many members, nay, in the last resort, only by the united action of all members of society, can it be set in motion.

Capital is, therefore, not a personal, it is a social power.⁴⁶

Both conservative writers and socialist thinkers stick to their own interpretation of the labour theory of property. But one thing on which both agree is that labour is the basis of property; their dispute is regarding the proper distribution of the produce of labour. The conservative thinkers in their structure of social systems ignore the

45. Critique of the Gotha Programme, in Marx and Engels. Selected Works in one Volume, London 1970, p. 321.

46. Manifesto of the Communist Party, op.cit., p. 47.

implications of their labour theory of property and draw different conclusions to support existing political systems. They ignore the question why if all products are the result of labour, is the labourer not the owner of his products? These conservative writers, as discussed above, from their labour theory advance different corollaries to support their own conclusions and ignore the right of the labourer to his product; so much so that they lose the essence of their own theory. The socialist writers on the other hand sticking to the labour theory as the justification of property regard the labourer as having the right to the whole produce of his industry.

But how can the labour of X be compared to the labour of Y? The quantum of each cannot be measured exactly. The exchange of one with the other will involve some exploitation, however small or large it might be. One may reap the benefit of others' work and never be conscious of it. Can we determine precisely that we are no longer exploiting the labour of others? The principle of distribution based on individuals' needs rather than on their capacities or capabilities will in fact yield an independent criterion for the justification of private property or, rather, for its social distribution. It reflects the purpose of the institution of property, because it makes provision for providing the necessities of existence to human life to all human beings, and gives security for its existence and continuation. But it is clear that both these principles, namely, that of the right of the labourer to the whole produce of his labour and that of distribution on the basis of needs, cannot be realised in any society at the same time. Labour and wants do not necessarily coincide in any constitution of society. Second, the

right to the whole produce of labour cannot be implemented in case of certain members of society such as the handicapped. One cannot say that because of their incapacity they have got no right to live.

For social life human beings need social institutions. A society will adopt those institutions which are most liable to preserve and perpetuate its existence. One cannot avoid this conclusion. It is almost an axiomatic truth. The institution of property exists and survives as an institution supremely because or to the extent that it makes provisions for the necessities of human life. The only justification for the existence, preservation, and continuance of the institution of property is the fulfilment of the function of meeting the needs of human life. It is this conviction which is keeping this institution in existence. When it ceases to perform this function, human beings in pursuit of their right to preservation of their life will seek another institution which, subject to appropriate regulation, provides for the necessities of their preservation. This is the clue to the whole problem. If this view is correct, it would require the present social structure of the institution of property to be reconstructed so as to secure fulfilment of needs of each individual, with recognition of individual economic rights rather than simply political rights such as were postulated in the past centuries. It would also answer the question why people do cling so stubbornly to the preservation of the system of private property of some kind, unless they forego the merits and advantages of civilised life like a hermit who avoids the corruptions of civilisation by foregoing its advantages.

If one looks at the economic life by which one is surrounded, one finds that the main purpose of everyone's labour is the greatest reasonable satisfaction of his needs. The ideal justification of the law of property would then be the satisfaction of human desire for those things which are reasonably necessary for human living. The recognition of the principle of equal satisfaction of human needs provides a principle for regulating the institution of property, which is presupposed in recognition of the right of subsistence of each individual. It is the right of subsistence which, thus, provides the fundamental justifying ground for private property. Private property has a true justification only so long as it is based on the recognition and satisfaction of the right to subsistence. Human needs for subsistence may vary considerably from place to place and time to time and may stand in sharp contrast to some other less pressing needs but the right to subsistence may well stand as the justification of the institution of property. To deprive any one of subsistence or the means of subsistence is to deprive one of one's life. The institution of property is the means devised in society to regulate the order of things for human existence. As Menger states:

The necessities of life form the basis of the right to subsistence ... which may be characterised as recognising the claim of every member of society to the commodities and services necessary to support existence, in preference to the satisfaction of the less pressing wants of others.

The right to subsistence will present the individual interest as against

47. Menger, A., The Right to the Whole Produce of Labour, trans. Tanner, M.E., London 1899, pp. 9-10.

the community so as to allow each individual property for his subsistence. Such a right to subsistence will, thus, represent on the one hand, each individual's interest against the community of which he is a member, and on the other hand, the duty of the community to protect its members against exploitation by other members. As a logical conclusion it will replace the right of property in the present legal sense which creates a divergence between the use of property and the legal title to it. The existing law of property is based on the traditional political conditions and is not aimed specifically at the satisfaction of economic needs of individuals. It neither secures to the labourer the produce of his labour nor guarantees the satisfaction of the economic needs of individuals. The deficiency of existing property law to some extent is made good by such institutions as national insurance schemes, old age pensions, national health services, etc. But these are state welfare schemes and neither a part of the property law nor a property right - but because of their economic importance can be regarded ancillary institutions to the law of property.

All institutions exist to serve human existence. The institution of property cannot exist and be used irrespective of the welfare of society. It is to cater for the necessities of human existence. Those needs of the individual which are absolutely basic to human living, that is, necessary for subsistence, can be the basis of the institution of property. It is on this principle that the institution of property ought to be so reconstructed as to be an essential preliminary to the realisation of individual needs. We can believe that it is right to own property because

it is sanctioned by these basic needs of human life. It is this principle which can bridge the chasm which seemed to exist between different principles for the justification of property. But if one asks what are the basic needs of life - the answer is whatever is necessary for subsistence, to sustain life at different stages of social development.

As Hobson states:

With the organic interdependency and the historical sequence of needs ... the satisfaction of the lower material need is always more urgent and important than the satisfaction of a higher need, because the latter is historically⁴⁸ non-existent, having as yet no soil out of which to grow.

But does this mean that other intellectual and moral needs for subsistence, which are necessary to sustain life, are not real needs? Hobson states:

What is "necessary"? Something that is essential to support life. But what life? "Physical life" is the common reply. If, however, we endeavour to apply a bare physiological test, it does not avail. What are the physical necessities of life? Are they the food, clothing, shelter, ... that which was comprised in the "necessary" or "bare subsistence" ...? Not so. The full physical life ... is not thus secured ...

Physical, moral, intellectual, are not watertight compartments of humanity. Whether we regard the organic interaction of all these vital powers, or take into our consideration the moral and intellectual needs and satisfactions as claims of nature which emerge later on, there is no excuse for refusing to admit the latter as necessary to life, considered as the whole which it rightly⁴⁹ is.

Similar views were expressed by Marx. He stated that mere subsistence wages were paid to labourers to keep them alive and thus they

48. Hobson, J.A., The Social Problem, London 1901, p. 82.

49. Ibid pp. 78-80.

were merely treated as commodities - "It has resolved personal worth into exchange value."⁵⁰ Under such conditions human potentialities could not attain moral, physical, and intellectual maturity. They could not become emotionally and intellectually fully developed human beings because their bare existence forces them to attain nothing but to "sell ... their own skin".⁵¹ Thus the right to subsistence as the basis of property includes all those necessities of life which may be characterised as recognising the claim of every member of society to the commodities and services necessary to support existence though it must not be forgotten that they vary considerably according to time and place.

The right to subsistence as the basis of ownership will maintain and support the institution of property because the functional aspect of ownership will find its economic basis as an essential condition for its existence. Such a basis of the right of property will be different from the traditional rights of property which is based on the idea of control of an object irrespective of its economic basis. The right to subsistence would represent the interest of all individuals against the community, as well as the interest of the community in maintaining the individual as a productive unit. The right to the whole produce of labour will then mean that the individual as a productive member of the community has a right to a fair share in the whole produce of the community which will be treated as a social produce of the community rather than of a group or an individual as under Lockean theory. Menger states:

50. Manifesto of the Communist Party, op.cit., p. 38.

51. Marx, K., Capital, vol. 1, p. 667.

The right of all citizens to the satisfaction of their absolute needs may in such a case be⁵² regarded as a form of mortgage on the national income.

Hence labour, with the recognition of the right of subsistence, will cease as a saleable commodity as a first condition in the reconstruction of the institution of property, but regarded as a service whereby a social relationship is established. Unless this condition is met, labour as a commodity fluctuating with the market's supply and demand shed labour of all dignity, the idea of the right of subsistence cannot be made the basis of any wages of any labourer. Labour will cease to be an item in the cost of production - a mere commodity. This will produce quantitative and qualitative changes in the relationship of worker and wages, for labour is a social, and not merely an individual, matter.

Ownership being based on the right of subsistence would also dissolve any difficulty as to attributing ownership to those who cannot participate in the production of the gross national product, such as children, infirm, or handicapped. Thus in the case of children, for example, the right of subsistence will entitle them to support and education, etc. Similarly in the case of the handicapped, the right of subsistence will entitle them to support for the fulfilment of their needs. Housing, education, etc., are all aspects of the institution of property, if not directly but indirectly, since no economic activity that affects human life can be dissociated from the institution of property.

Both the labour and the wages of labour are determined by the institution of property and since the institution of property is to be based on

52. Menger, op.cit., p. 10.

the right of subsistence, the question arises on what criterion labour and wages of labour are to be calculated? The value of labour as a measure of wages is not a practical solution to the right of subsistence for there are different kinds of labour, and because of the variability of the conditions under which the labourers have to work. The right to the whole produce of labour is inconsistent with the right to subsistence, for people working in different factories and producing differently will receive differently. This will create a fair equality in wages so far as workers of one factory are concerned but will create disparities among the workers outside the economy of the factory. The workers of one factory may become richer than the workers of another factory. Neither of these valuations, wages according to labour value and the labourer's right to the whole produce of labour, fulfils the 'function of the institution of property' to meet the needs of each individual. The right of subsistence as the basis of the institution of property can be satisfied if in a given society the wages are fixed on the basis of a reasonable standard of living. The workers, irrespective of the value of the work produced, must receive those standard wages. Second, as far as production is concerned, in different industries the reasonable standard of production and reasonable working conditions will have to be set. Both these conditions are to be made independent of any economic fluctuations and subject to adjustment in the case of economic variations. The workers engaged in different set of works, with different abilities and responsibilities are to be encouraged not so much by the chance of making a fortune but by giving public recognition to their services. Again differences arise because the idea of labour is associated

with only physical labour. Intellectual ability is not called labour. But both mental and physical labour are alike, if not in nature, at least as necessary and essential parts of the social set up to keep society going. One is as important as the other. So to degrade one in comparison to another is to start a class distinction which will not only disturb but upset the institution of property based on the right of subsistence. Why should either the natural abilities or the external physical conditions be allowed to affect the institution of property when each condition is as important as the other to maintain social order? Thus sometimes a little more wages for physical work or a little more for mental work should not upset the workers because a given society which accepts the right to subsistence as the basis of the institution of property will not pay less than the efficient wages and will not be such as not to recognise high capabilities whether mental or physical. If a doctor gets the same pay as a miner, he is to realise if all become doctors who will be a miner? The miner cannot do the doctor's job nor is a doctor fit to be a miner, nor can either of them do both the jobs at the same time. If there is one doctor in a city he will earn more, but if ten more appear in the city, the former would not be able to earn as much as he used to do, before the ten appeared on the scene. So it is the situations in which a man of physical or mental ability finds himself that makes him a candidate of fortune and not his ability. Thus gradations of labour are not essential from the point of view of the institution of property, but are important from the point of view of the running of social order.

53

53. Tawney, R.H., Equality, Open University edition, London 1964, p.113.

Theoretically this concept of private property represents Aristotle's idea of property - it is clearly better that property should be private but the use of it common,⁵⁴ common means whereby everybody draws his subsistence according to his needs. It has the advantage of both the communal and private property. Pollock repeats Aristotle when he says:

How to foster and maintain a state of generous friendship in which a man shall give and take in turn of the good things of life, so that property shall in effect be several in title, but common in use.⁵⁵

It will be equalisation of social conditions and at the same time preserving the institution of property as a fabric of our social system.

Menger states:

Now, when so many communists speak of an equal distribution of wealth in a communistic state, it is this distribution in proportion to wants and existing means of satisfaction to which they refer. For no one could seriously strive for a really equal distribution in the face of the enormous differences in wants due to age, sex, and individual character.⁵⁶

Aristotle and Plato sought equality of conditions in ideal constitutions by limiting accumulations. The social aspirations of our times are trying to base property on the right to subsistence by making such provisions in legal systems as providing subsistence to old age pensioners, children, and handicapped, etc., as a duty of the community towards its members.

How is it that labour which is the means by which property is

54. Aristotle, Politics, ii, 8.

55. Pollock, Introduction to the History of the Science of Politics, London 1911, p. 23.

56. Menger, op.cit., p. 9.

produced is not the basis of property? Why is it that the justification of property is not sought in the right to labour but in the right to subsistence? Labour is only the means by which property is secured. If no one will labour there will be no property for consumption. The basic idea of granting property to the individual is not to secure to the individual the right to labour but to secure him his subsistence which is necessary for his existence. Now subsistence is a biological necessity and securing of the means of subsistence is a social necessity. It is the securing of the means of subsistence that is property. And the idea of having property is having subsistence. Thus if legal systems, as at present, only secure to the individual the right to labour as a justification of property, they secure him the capacity to produce property whether it is sufficient for his subsistence or not. But if legal systems secure to the individual the right to subsistence as a justification of property, they secure him his subsistence which he must get as a result of his labour. It is this character of property which distinguishes the right to labour from the right to subsistence. The latter is an immediate claim on the community from whom the claimant may demand in return for his work the necessities for his existence, but duty to labour can only be enforced when it is proved that the claimant has failed to find work.⁵⁷ Second, the right to subsistence can be extended even to those who are not fit to labour, but the right to labour cannot be extended to all those who are not fit to labour. If the institution of property has its justification in the right to labour all those who are not

57. Menger, *op.cit.*, p. 16.

fit to labour will have no property. In short they have no right to life; yet there is a clear individual right to all necessities of life and one is deprived of life as soon as one takes away the means by which one lives. If the institution of private property has its justification in the right to subsistence, the right can be extended to everybody. Every one will be the owner of property.

Granting right of subsistence as a justification of private property, Malthus need not say:

A man who is born into a world already possessed, if he cannot get subsistence from his parents on whom he has a just demand, and if the society do not want his labour, has no claim of right to the smallest portion of food, and, in fact, has no business to be where he is. At nature's mighty feast there is no vacant cover for him. ⁵⁸ She tells him to be gone, and will execute her own orders.

Incentive theory of production

Despite all that, conservative writers argue that the individuals care more for their own than for social interests, and accordingly that a system which provides individual incentives to more production, is in truth best adapted to satisfy consumers' demands. The profit from private property is an incentive, and thus inequalities are to be tolerated on the ground that an egalitarian society would discourage effort and lessen efficiency and thus diminish the total production available for distribution. On the basis of such an incentive theory the conservative writers seek a social justification of inequalities of property - on grounds of 'the facts of human nature' rather than on

58. Malthus, An Essay on the Principle of Population, London 1803, p. 531.

grounds of ideal principles.

Bentham states that interference with rights of private property in the system of production would lead to the loss of efficiency and reduced production. But at the same time he himself wants to limit usury and therefore restrict, in this case, the most productive use of property, the source of wealth for a man who is making a productive use of his money. Similarly Adam Smith favours restrictions on the rate of interest.⁵⁹ In fact the right of the owner to such unearned income as interest is not found in economic incentives but in the positive provisions of law which support the right of ownership of unearned income. If there are good reasons against permitting unlimited rate of interest they must be based on some conceptions of justice other than that generated by the incentive theory.

Again the modern developments of property, as in the case of corporation, show that the theory of incentive to increase production is not wholly workable. Under the laws of minimum wages, pensions, working conditions, etc., corporations sometimes have to neglect the profit motive of private capital and there is no certainty that the corporation will be run for the benefit of the capitalist. In such circumstances what is the incentive to the large scale capitalist to invest in the corporations? The only incentive to such a capitalist is to achieve private economic power and thus to achieve a position of political influence so as to affect the future course of the social system in a manner which is in principle undemocratic. Again the law is formed

59. Smith, A., op.cit., p. 363.

in such a way that it supports the idea of unearned income. As Menger explains:

Generally the parties who propose such measures look at their political and economic objects, ignoring the social consequences, because the working classes - the ultimate producer of unearned income - are but sparsely represented in parliaments.⁶⁰

To remove this control over men and their social milieu arising from the economic power in private hands, Marx advocates not the abolition of private property generally, but the abolition of bourgeois property.⁶¹

Rejecting the claims of conservative theory of incentive Ginsberg remarks:

... it may well be that inequality of distribution was an important factor in the earlier stages of capitalism, but is no longer so in a stage of high technological development and large-scale organization. Indeed, at such a stage egalitarian redistribution may not only be compatible with, but a condition of, increased productivity. The problem of incentives completely changes its character as industry moves from the type which prevailed when the factory owner formed and managed his own business to that which exists under Joint Stock institutions in which ownership of capital and management are almost dissociated.⁶²

Justice demands the relative equalisation of wealth in a society so as to meet the subsistence needs of each individual in a given society.

But this equalisation measure is wrongly interpreted by conservative writers. Both Hume⁶³ and Bentham⁶⁴ interpret equalisation of

60. Menger, op.cit., p. 179.

61. Manifesto of the Communist Party, op.cit., p. 47.

62. Ginsberg, M., On Justice in Society, London 1956, pp. 99-100. Girvetz, H.K., From Wealth to Welfare: The Evolution of Liberalism, Stanford, California 1950, p. 140.

63. Hume's Moral and Political Philosophy, ed. Aiken, M.D., New York 1948, pp. 193-194.

64. Bentham, Theory of Legislation, London 1876, pp. 99 & 120.

property distribution as absolute equality. No socialist writer ever proposed absolute equality in distribution of property. How can the subsistence needs of a child be equal to that of a grown up man? How can the needs of a lawyer be the same as that of a doctor? When the socialist writers speak of an equal distribution of wealth, it is according to the variability of needs. No one can establish an absolute or perfectly equal distribution in the face of such a vast variability of subsistence needs. Thus the right of property based on the subsistence needs of each in a society does not mean absolute equality nor does it mean that such a basis will lead to inefficiency and unproductiveness due to lack of incentive to produce more. For example, restrictions on inheritance do not condemn people to produce less. Again sumptuary laws do not mean that people should produce less because they could not use their product in every possible way they might wish. Thus incentive is not the only possible motivating force to regulate production.

Realising that self-interest or the incentive motive as a source of maximising happiness of the individual as an intrinsic good, is not the only intrinsic good, the utilitarian thinkers include among intrinsic good moral, aesthetic and intellectual activities.⁶⁵ This modification lent support to the ethical basis of property and transformed their earlier stand based on psychological hedonism. If it is so, the theory of the right of ownership as being based on self-interest for maximising happiness as an intrinsic good and as providing an incentive is replaced

65. Cf. Rashdall, H., "The Philosophical Theories of Property", in Property - Its Duties and Rights, ed. 1913, pp. 50-51.

by a theory allowing for the moral qualities and creative faculties, in short, by the qualities of character and personality. It will then be urged that private property is not a mere incentive but rather an essential requisite for self-expression and development of personality. The incentive for production and distribution will then not be external profit but the development of the well-being of human personality which lies not in the individual's independent interest but in his interest as a member of society. A similar conclusion follows from what Locke says when he states that the property which the state is obliged to protect includes "lives, liberties and estate"⁶⁶ of the "whole people"⁶⁷. The right to revolt arises when the state neglects her duties and tolerates economic and social arrangements which render the majority of her members propertyless. But it is ironic that Locke with such an idealistic sense of human nature avoids the foregone conclusion of his own theory.

Private property is essential and no system of government can do without it in one form or another. But private property based on the idea of conservative writers as providing an incentive to further production so as not to paralyse individual initiative cannot serve as a legally, politically or morally sound theory of justice, because it places in the hands of the capitalist overriding powers over men and social interests. It is not morally sound because too much in one person's hands means less to others. The man who is taking more and more is not becoming much happier but the poor by becoming poorer tend to reach a stage where

66. Locke, J., The Second Treatise of Civil Government and A Letter Concerning Toleration, edited by Gough, J.W., Oxford 1946, p. 62.

67. Ibid, p. 152.

nature is working away at them to get them out of the way. Against an incentive theory based on the egoism of psychological hedonism Spir comments:

Do you believe that men will always earnestly desire to see justice realised or not? If answer is No, then it is useless to speak of right and justice at all. If, on the other hand, the answer is Yes, then it must be understood that present circumstances and conditions are no criterion for the future. While egoism holds sway, justice certainly cannot be realised.

As has been stated in this chapter, labour is the essential condition of production, but is not to be the basis of the right of property, because the distribution effectuated under such conditions clearly advances not personal efficiency but the purpose of economic activity for the existence only of those who are fit to labour. But a virtuous disposition is the altruistic, wherein one finds one's happiness in the happiness of others. The common interest must be each one's chief interest - the good of the whole is his chief good. A healthy system of industry will demand from each producer the best amount of labour not because of external reward for his labour but because of his own appreciation of socially useful work for the common economic needs of society. As Hobson states:

It is an important task of economic science to enforce conceptions of the operation of economic laws which will support these newer and sounder views and feelings. For only with this growing recognition of the social harmony represented by industry can the social will be nourished that is necessary to support and further it. So long as the ordinary business man or worker has his eyes, his mind, his heart and will, glued to the tiny patch of industry to which his own directly personal effort

68. Spir, A., *Right and Wrong*, translated by Falconer, A.F., Edinburgh 1954, pp. 69-70.

is applied, the pulse of humanity beats feebly through the **system of industry**. But let the **ordinary education of every man and woman** impose clear images of this economic order as a **great human cooperation in which each bears an essential part, as producer, consumer and citizen, the quickened intelligence and sympathy will respond, so that the blind processes of cooperation will become infused and strengthened by the current of a conscious will**.⁶⁹

The idea of classical economists is that it is self-interest that propels a man to more production because of his profit motive. But the question arises does self-interest consist only in accumulation? What about self-interest in scientific inventions, literary works, national interests, interests in humanitarian works, etc.? Therein self-interest does not include accumulation of fortune. The classical economists, when they interpret self-interest, stick only to pecuniary gain and thus leave aside other types of conduct included in the self. Again the question arises whether the altruistic virtues or what we may call other-regarding virtues really form a part of human nature? Hume states that other-regarding virtues depend on training and become habits by conventions. It is here that one touches the most sensitive spot of human nature and comes to realise that self-interest in fact can be replaced by altruistic virtues through habits and conventions - which shows that self-interest is, in fact, not an intrinsic nature of man. Thus the classical idea about human conduct upon which they so firmly fixed the institution of property is both false and trivial. Thus economic activity need not be directed towards the external motive of profit or any pecuniary gain because human nature is compatible to

69. Hobson, J.A., Work and Wealth: A Human Valuation, London 1914, pp. 281-282.

altruistic virtues. Thus it is a case for modification of institutional arrangements because the classical writers following the pecuniary tendencies of their times, fixed the insignia of accumulation of wealth on human nature and thus on the institutional scheme of the institution of property. Girvetz states:

Thus, the otherwise empty concept of egoism ... was identified with acquisitiveness, or, more precisely, with the quest for pecuniary gain which passes as the profit motive. As a result, the profit motive could be understood without reference to its institutional origins and historical antecedents; it received its credentials from human nature and, like human nature, it was thought ineluctable, given - and therefore accepted. The identification of self-interest and the profit motive was thus mutually advantageous; self-interest acquired a specific meaning, and the profit motive was lifted out of the flux of history, was fixed, fastened, and made firm.

The classical writers have taken it for granted that existing property rights and pecuniary incentives are the only basis to sustain a healthy economic system. Criticising such preconceptions of fixed Newtonian universal laws and their implications, Girvetz remarks:

Reading some of the orthodox economic tracts of the nineteenth century, one gets the impression that the lack of availability of food, clothing, and shelter to large numbers of the population is a matter of sentimental and subordinate concern; the main object is not to do violence to human nature by departing from the principles of orthodox economics. Precisely the same impression is left by those who strenuously opposed large scale relief in the 1930's; many appeared to believe that a balanced budget is more important than a balanced diet.

The conventional writers instead of attending to how man behaves in concrete circumstances started and framed theories based on a

70. Girvetz, H.K., op.cit., p. 131.

71. Girvetz, H.K., op.cit., p. 150.

hypothetical model how men propelled by the principle of pleasure or pain would behave given appropriate bait. On this basis legal systems changed the institutional basis of the right of property. There is, thus, a plausible case for rethinking and modifying the existing institution of property on a realistic basis so as not to defy concrete human nature. Dewey remarks:

It is "natural" for activity to be agreeable. It tends to find fulfillment, and finding an outlet is itself satisfactory, for it marks partial accomplishment. If productive activity has become so inherently unsatisfactory that men have to be artificially induced to engage in it, this fact is ample proof that the conditions under which work is carried on balk the complex of activities instead of promoting them, irritate and frustrate natural tendencies instead of carrying them forward to fruition. Work then becomes labor ... Paradise Regained means the accumulation of investments such that a man can live upon their return without labour. There is, we repeat, too much truth in this picture. But it is not a truth concerning original human nature and activity. It concerns the form human impulses have taken under the influence of a specific social environment. If there are difficulties in the way of social alteration - as there certainly are - they do not lie in an original aversion of human nature to serviceable action, but in the historic conditions which have differentiated the work of the labourer for wage from that of the artist, adventurer, sportsman, soldier, administrator, and speculator.

The classical economists start with the idea that man being selfish, lethargic and passive needs some sort of motive power to work and this motive power is a system of incentives and rewards. It is this passive thought that gives credibility to the ideas of Locke and Bentham, etc. Hume's only credit is in admitting that other-regarding virtues are learned by men from training. But here one argues with Hume - if other-regarding virtues become a part of human habit then in future

72. Dewey, J., Human Nature and Conduct, London 1922, pp. 123-124.

they will be part of human nature. If this is so, then Hume's basic contention that man is passive is untrue. One argues, is not human activity a manifestation of the life-process itself? Does it need to be bribed into displaying its initiative and inventiveness? Do people sometimes not work by sheer habit, loyalties, ambitions to get prestige? Modern thinkers⁷³ do not agree with this quietism of psychology introduced into philosophy. It is against this passive theory that Dewey, Veblen, Rashdall, etc. react and hold that the psychological passivism adopted by classical economists ignores the creative desire of man and his sheer desire to engage in productive activity. Frankfurter remarks:

The crucial fact of modern industry is its failure to use the creative qualities⁷⁴ of men, its deadening monotony, and its excessive fatigue.

The idea that man is a part of an organic society, given freedom from want, provides an atmosphere in which his activities do not depend on pecuniary rewards. Their standards and their values for life rise and fall with that of society, social conditions determining the level of economic activity. If fit people do not work and produce enough to maintain society, it is not only those who are unfit to work who will fall, but also those who will not be providing enough to maintain the whole. For it is the duty and responsibility of members of any society, whatever be its particular institution of property, that they must provide subsistence to each of the members for her continuance and that of her

73. Ibid, p. 118.

Veblen, T., Essays in Our Changing Order, N.Y. 1934, p. 78.
Rashdall, op.cit.

74. Frankfurter, F., Law and Politics, New York 1939, p. 203.

institutions. But where classical writers have considered society as an aggregate of individuals their theory of incentives has ignored the human side of the equation and is concerned only with production - it has ignored the human cost involved in getting it. Hetzler remarks:

The stocks by which corporate industry are owned, are bought and sold in complete divorcement from the reality of the work situation. The concern of the stock buyer is not with the social merit ... but with the ability of the industry to make money.⁷⁵

Because of their concentration on external prodding as an instrument of production, the classical writers and orthodox economists ignored the ethical element in the production process. The classical economist Veblen remarks:

make exchange value the central feature of their theories rather than the conduciveness of industry to the community's material welfare.⁷⁶

Describing such an idea of common purpose and social cooperation in industry, Hobson states:

Were such an order effectively achieved, in accordance with the rational and equitable application of our human law of distribution, the economy of industrial processes would be accompanied by a corresponding economy of thought and emotion among the human beings engaged in this common cooperation.⁷⁷

If such an idea of common purpose and social cooperation is to work, it is only when the institution of property is first impressed on the mind of the people as having its basis on social and moral foundations rather than having any predatory and instinctive basis.

75. Hetzler, S.A., Technological Growth and Social Change: Achieving Modernization, London 1969, p. 256.

76. Veblen, op.cit., p. 100.

77. Hobson, Work and Wealth, p. 290.

The question arises: 'If subsistence is granted to everyone and there is left a surplus, what is the right way to deal with the surplus?' This inquiry arises only if all modes of production are state owned. If they are not under public ownership, the extra will be taken by the state by way of taxes for the maintenance of public services, for society is the essential foundation of production. Second, as Menger suggests:

But a complete realisation of the right [Right to Subsistence] would absorb so large a portion of the unearned income which property now bestows on landlords and capitalists, and deprive private wealth of so much of its social value⁷⁸ that it would soon be converted into common property.

But if all means of production are publicly owned and the state after dispersing all the necessities, is left with a surplus (which is only hypothetical since there is no such affluent society to my knowledge) how is this surplus to be dispersed? Society can disperse this surplus by giving rewards to its citizens for quality of work. The distribution of rewards cannot be fixed by any scientific method because variability of occupational structures will elude any objective criterion. The range of differentials can only be determined empirically by judging the value of different occupations under variable conditions. The main function is to establish the right of subsistence as the foundation of the right of property under all varieties of circumstances so as to promote social well-being and make society a better place in which to live. Hobson states:

An economic reformation which, by applying the

78. Menger, A., op.cit., p. 11.

human law of distribution, absorbs the unproductive surplus, would thus furnish a social environment which was stronger and better in the nourishment and education it afforded to man. Every organ of society would function more effectively, supplying richer opportunities for healthy all-round self-development to all. So far as the economic activities can be taken into separate consideration, it is evident that this justly-ordered environment would do much to raise the physical, and more to raise the moral efficiency of the individual as a wealth-producer and consumer. But its most important contribution to the value and the growth of human welfare would lie in other fields of personality than the distinctively economic, in the liberation, realisation and improved condition of other intellectual and spiritual energies, at present thwarted by or subordinated to industrialism.

CHAPTER VI

THE MOVEMENT TOWARDS A SOCIALISED
CONCEPTION OF PROPERTY

The institution of property is a socio-legal institution. With the change of circumstances and new developments, new rights are pressing for recognition. This development, which follows from the growing complexities of social life, is showing itself in social stresses on the current conception of property. New legal norms, having their basis in social purposes, are emerging to form the basis of the institution of property and re-structuring the economic life of the society. As Menger states:

The social aspiration of our time aim essentially at a reorganisation of the economic life of mankind. They start, it is true, from a searching criticism of our existing economic conditions; but this criticism leads to certain juridical postulates which involve an organic reconstruction of our actual rights of property.

It is a commonplace that there are no water-tight compartments in the history either of ideas or of institutions, and every historical period is in a sense transitional. Every social institution is a product of developments, whose causes are to be found in changing social conditions. Each stage contains the next, in germ. It is, however, an unstable equilibrium, as Giddings explains:

Since the tendencies toward both cohesion and dispersion are persistent, the social system simultaneously exhibits phenomena of combination and of competition, of communism and of individualism.

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1. Menger, A., The Right to the Whole Produce of Labour, trans. Tanner, M.E., London 1899, p. 1.

Neither order of phenomena can ever exclude the other, but at any given time one or the other order may be ascendant and there may be a rhythm of alternating ascendancy of combination or competition, communism or individualism.

The reason why there is this perpetual state of flux, is to be found in the development of human relations, which are continually posing new problems for the society to solve.

We are in danger of overestimating the stability of legal conceptions. They appear to be entirely stable, many of them have their roots in the most solid portions of our nature. In fact, people who have become accustomed to particular laws and institutions are apt to suppose that they are essential to the well-being, if not to the very existence, of society.³ We find various forms of village communities and of feudalism appearing all over the world, as if they were necessary stages in the development of nations. This great stability suggests that they are absolute and indestructible. But this is certainly not true. Legal conceptions are undergoing changes and their functions also change with the change of circumstances. Legal order exists for human beings alone, to regulate their interpersonal relationships. Since individuals have different personalities and, indeed, one generation often has a different personality from another, the nature of the relationship created is subject to change. Basically an order remains an order, but is liable to change in form and content. Thus social

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2. Giddings, F.H., Principles of Sociology, London 1896, pp. 398-399.
 3. This ostensibly enduring character is the basis of natural law theories and gives a wrong impression about the changing and evolutionary character of law.

needs are the essentials of life that give vitality to all legal institutions.

As Pound states:

We do not base institutions upon deductions from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs.

In the words of Justice Holmes - the life of law has not been logic, it has been experience.⁵

The institution of property grew up in law to meet the economic needs of individuals. The law did this task by assigning the control of things to individuals. During the long history of the development of the institution of property the nature of the control, that is, the relation of the individual to things, was the subject of different variations. These variations were the result of different social tendencies at different periods in the long history of the institution of property. Sometimes the individual was given unlimited control over things and at another time the social needs guided his control. These variations were the result of sensing of the relation between an individual and an object of his control.

The institution of property in the fully developed classical laws of ancient Greece and Rome was regarded as a two-tier relation - relation between an object and an individual. Social or legal order was merely instrumental in protecting this relation from interference by third parties. Property was regarded an extension of the person

4. Pound, R., "Mechanical Jurisprudence", Col. L.R., 1908, p. 609.

5. Holmes, O.W., The Common Law, Boston 1945, p. 1.

over things since it was given meaning primarily through the notion of occupation of *res nullius*. Regulatory legislative measures as in modern times, were merely administrative processes and not a part of the conception of property. Exclusive of these measures the individual was regarded as having sole dominium over his objects. The reason for this two tier relation is found in the system of those days when the head of the family was in exclusive control over his family and its belongings. With the disintegration of control into two spheres - domestic control and control of things - the latter was the control of things. As Noyes states:

The system of control originally exercised therein, indiscriminately over persons and objects, though it also developed into, and at first gave form to, the differentiating super-familial (political) and intra-familial (domestic) controls of later times, was preserved most nearly intact⁶ in the later system of property - the control over objects.

Ownership was confined to dominant control over objects and was sensed in two tier relation. As Aristotle⁷ states, a piece of property is sometimes spoken of as a part; for a part is not only part of something but wholly belongs to it, as does a piece of property. So a slave is not only his master's slave but wholly his master's property. Thus ownership was regarded as absolute vis-a-vis the object. Only the state acting administratively was allowed to deprive a man of his property subject to payment of full compensation. The proprietary right of the owner vis-a-vis other individuals was absolute.

6. Noyes, C.R., The Institution of Property, London 1936, p. 131.

7. Aristotle, Politics, i, iv.

Ownership in Roman Law was construed around this extension of individual control over objects and its absoluteness was checked not by general social considerations but by the state's administrative actions. The individual was, therefore, conceived as having certain interests which were recognised as being in some sense independent of the interests of the community. The right of ownership revolves around two entities - an individual and an object, the owner having the right of use and abuse independent of any social considerations except the power of the state to interfere in case of public need. This absoluteness was the nature both of Greek and Roman ownership.

The reason for this stress on the two tier relation (two tier theory of property) was the failure of Roman jurists to analyse the nature of the relation and relate it to other persons who have the duty of non-interference towards the owner to maintain an institution of property.

As Terry states:

The owner stands in a certain relation to the material thing which he owns; and neither the nature of such a relation, nor of the thing toward which it existed was regarded by the earlier Roman jurists as a matter calling for analysis or explanation. Each was treated as a simple idea, one of the *praecognoscenda* of legal science.

Chaudhuri, while commenting on the Roman theory of property and similar theories, states:

Epistemologically speaking, these concepts of property involved sensed persons and/or sensed things in two-termed relations. No epistemologically clear method for relating distant, unperceived, and hypothetically conceived persons with non-tangible property ... was devised.

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8. Terry, H.T., Some Leading Principles of Anglo-American Law, Philadelphia 1884, p. 28.
 9. Chaudhuri, J., "Towards a Democratic Theory of Property and the Modern Corporation", *Ethics*, 1970, vol. 81, p. 272.

This ambiguity of the two termed relation tends toward harshness in social policy, since it stresses the right of the individual as an independent unit. It does not stress the relation of rights and duties between individuals in defining their civil liberties in dealing with objects.

This social character which is an inherent part of the right of property, which was in oblivion, was brought to the surface with the gradual change of circumstances. Under Roman law, expropriation of private property was the privilege of the state, but such expropriation even in the public interest did not socialise this particular conception of property. The observation of individual duties towards each other in appropriating objects of property was not considered as a matter of social responsibility, that is, public law, but was left to be decided by the individuals among themselves. For example, if a man is using his property which causes some damage or inconvenience to others, it was always left to the parties to settle among themselves. There was no general provision of the law regulating their conduct. The social effects of such settlements were considered the parties' own affair. To compare such a law with the modern law, one finds that now no such settlement, pact or stipulation can be made outside the provision of law. Even if the stipulation between two individuals affects only their own character, it may be void or illegal. For example, eating opium is prohibited, gambling laws restrict one use of one's own money, even sale of one's own property for immoral purposes is prohibited. The extreme case of destroying one's own property has in some circumstances been made illegal, for example, defacing and destroying currency. Thus expropriation though made in the public interest, limits the individual

rights and duties not vis-à-vis other individuals but vis-à-vis the state. An institution is socialised when individual rights and duties with respect to the functioning of the institution limit each other's rights and duties not in the interest of each other but to promote some social purpose as a whole.

The unlimited nature of the right of property dominated the social and legal thought of the mediaeval times. The feudal system was a hierarchical system in which the lord was at the apex and his vassals were likewise assigned a definite station in the social hierarchy. These vassals were bound to perform certain obligations towards the lord, and in virtue of their ties to the lord were assigned land over which the lord had direct control. Thus the vassal held the land in return for certain duties towards the lord. Thus in relation to ownership, there were three elements, the lord, the vassal, and the land. The vassal's role, if one thinks of him as analogous to an owner as a title holder, was not an independent social function of cultivating land, but as an appendage to his obligation towards the lord. Thus in reality the real property relation remained between the lord and the object - land. The vassal merely served as an intermediate link between the land and the lord. The vassal holds the land so long as he performs his obligations towards the lord. The vassal cultivates the land not as a part of his social responsibility towards the land, that it should not lie fallow, but as a part of his obligation towards the lord. Thus the feudal system is a two tier system of property relation. Suppose the vassal is to pay his lord a certain amount of rent and he cultivates land

towards the payment of that rent and no more, but lets the rest of the productive power or fertility of land run to waste. The lord will not charge him for not fully exploiting the productive capacity of land. There is no social obligation on him to exploit the land fully and let it not lie deserted, because the social obligation is not directed towards the cultivation of land but is directed towards the lord who has supplied him the land.

Feudalism is a system of governing men through the agency of ownership of land. A system burdened with oppressive obligations, directed towards maintaining the glory of the lord rather than directing obligations for the general welfare of the public. The lord manages land through his vassal not for the purpose of performing social obligations but attaches social obligations to the lord for the purpose of maintaining his established system of social order. The obligations imposed on the vassal through the lord's ownership of land enter into all human relationships. And this shows the centralisation of all obligations imposed on the vassal as obligations towards the lord. For example, when the lord's son or daughter is to be married, the vassal is to pay tributes, burdened upon him by virtue of his being a vassal. The system shows its social, political, economic and legal value in terms of services rendered towards the lord rather than the services rendered by the functioning of the ownership of land towards the welfare of the people. This is so because the lord is the owner of the land and his allotment of land has little to do with the performance of duties towards the community. If because of an allotment of land the lord requires the vassal to go with him to the battlefield his duties towards

the lord are performed not by cultivation of land but by going to the battlefield. During the course of a vassal's absence from the land, it is the lord who may or may not make alternative arrangements for the cultivation of the land, but during that period the vassal as a cultivator of land is free from his obligation to cultivate the land. The vassal has performed his duty not by cultivating the land but by going with the lord to the battlefield. This is so because the feudal system presents a system of property which is based on a two tier relationship between the owner and the object. Social functions do not form a part of the institution of property. With the decay of feudalism, a system of property based on individual enterprise, rather than individual relationships constituting enterprise, gradually established itself. Though this rise of a new property system rejected the intermediate personal relations, in essence the new system preserved the old relation between an object and an individual, the unlimited nature of right of property. This change has yet not touched the idea that economic and social purposes were the end of the institution of property which give significance to the institution of property.

With the rise of industrialisation, the idea of the rights of man, in contrast with the suppression of individual liberty under feudalism, got new vigour and became the guiding philosophy in all spheres of life. The liberties of the individual in legal terms became equal and the individual's right of property was defended. His free bargaining power to acquire property itself was termed property. Any interference with individual liberty was cautiously watched. These changes created new rights in consonance with the needs of time. For example, the invention

of the printing press brought into existence new rights regarding freedom of speech. Again industrialisation created new phases of rights like rights arising from the relation of master and servant and right to strike. With these changes, the individual became aware of new rights, many of them unknown in previous stages of civilisation. This explains the fact that, and the processes by which, the evaluation of various rights differs under changing circumstances; and how all legal developments carry with them and have roots in social changes and developments as Ehrlich says:

All legal development therefore is based upon the development of society, and the development of society consists in this, that men and their relations change in the course of time.¹⁰

The eighteenth century adopted the freedom of property as a main theme of its legal development; and by the end of the century this freedom reached its climax. The idea of unrestricted appropriation of property was generally accepted. The idea of property relations, the relation between an object and an individual, without reference to the duties, was paramount. And this means the acceptance of static property - property without its economic function to the community. Such a freedom of property was defended both by naturalist philosophy¹¹ and utilitarian thinkers.¹² Idealist philosophers like Kant and Hegel regarded the freedom of property as a cardinal requisite for the develop-

10. Ehrlich, E., Fundamental Principles of the Sociology of Law, trans. Moll, W.L., Cambridge, Massachusetts 1936, p. 396.

11. See chapter v.

12. Ibid.

ment of human personality, and thus supported the unlimited right of property. But Hegel, like other individualist thinkers, failed to stick to the conclusion of his theory. If all individuals have personality then all need property. If all need property then the rights of each cannot be unlimited, because the unlimited right of each is the negation of the right of some other. The main theme for the individualist thinkers in their idea of property is the unrestricted freedom of use and abuse, and the idea that property relations are limited within the bounds of an object and an individual. The idea of duty as a function or basis of property is negated as soon as one sticks to the two tier theory of property.

This theory of economic justice which prevailed during the 18th and 19th centuries finds support in the laissez-faire doctrine which attained great popularity since it was identified with industrial progress. The doctrine states that the duty of the state is to abstain from economic activity and give the individual maximum economic freedom in conducting his economic affairs. State interference is considered detrimental to freedom and progress. It is not a theory of absolute exclusion without exceptions of state interference but its general principle is minimal state interference.¹³ This theory in its application was given

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13. Adam Smith believes that such a freedom is natural and for the well-being of society. But he suggests state interference in three spheres - protection from foreign invasion, and protection of citizens from injustice from the hands of other citizens, and to erect works of public importance from which an individual would never get profit.

Smith, A., The Wealth of Nations, vol. ii, book v, ch. i.

But Spencer believes in absolute freedom and condemns all state actions even in cases of national importance such as control of epidemics, postal system, etc.

Spencer, H., Social Statics, London 1902, pp. 197 & 217.

support on all grounds - social, moral, and political - as Friedmann states:

Thus science, economics, and ethics joined hands.¹⁴

Socially, this theory believes that man is the measure of all things. Each individual has enough reason to look after himself. The formation of society is for the protection of the individual and not for interference. It is only by his free choice, that a man can express himself, and develop his faculties. This view is based on the idea that society is a collection of individuals and in reality the individual by nature is an isolated and solitary being. Such a view is a pure fiction, for man is a social being. He has always lived in society.

Morally, this theory believes that all social problems one way or another reflect the character of man since man is a free being - freedom of the will is the basis. This approach inevitably subordinates the actions of man including his economic position and related consequences to his moral being. Poverty is, thus, a moral problem because it is due to the moral character of the poor.

But this is not the moral aspect that involved the unjust suffering of victims of economic forces beyond their control. The vast material output realised by industrialisation is inconsistent with the notion that poverty is a moral and inevitable condition of social life. With the increase in industrialisation, the decreasing role that human labour plays in the production of industrial wealth inevitably weakens the proposition

14. Friedmann, W., World Revolution and the Future of the West, London 1942, p. 13.

that moral character is the decisive factor in determining man's economic welfare. These improvements set in motion great industrial production and it is the socio-legal order which, because it is not based on just distribution, is the cause of poverty and not the moral character of man.

Legally, the theory of laissez-faire expresses itself in the maxim - minimum of law maximum of logic - minimum of interference with the individual's liberty to do as he chooses. Its legal effect is visible in a free labour market where everyone sells his labour irrespective of any legal restrictions. Professor Miller expresses this idea when he states:

I have observed the important part that contract fills in modern life ... and the individuals who enter into the relation are truly free. It is through contract that man attains freedom. Although it appears to be the subordination of one man's will to that of another, the former gains more than he loses.¹⁵

The laws for the benefit of society were thought of as conditions of perpetual servitude, thus, vicious and void. It is not surprising that in the new industrial societies which arose on the ruins of the old regime, the dominant note should have been the insistence upon individual freedom.

The use of men, women, and children by factory owners under the regime of laissez-faire had all of the advantages for the capitalist rather than for the majority who depend on him for their subsistence. It is, therefore, wrong to condemn legislative activity as a sign of

15. Miller, W.G., The Philosophy of Law, London 1884, p. 216.

servitude. The individual gets more freedom under the laws for the purpose of regulating social activity than without them. For example, traffic rules give more security and freedom of movement by traffic control than a man can get without them in a mob on the roads. Similarly by the control of economic activity greater freedom is assured to all. The government that regulates the economic activity with the idea of securing economic tools to the satisfaction of the economic needs of an individual secures greater freedom than is assured under *laissez-faire*.

The subjective basis of the rights of property gives an individual arbitrary power to dispose of the fruits and substance of an object and to exclude others from it. An individual may use his property arbitrarily, or not at all, or destroy it, or desert it. No duties were attached to the right because of the idea that property is a relation merely between an object and an individual. It can be remarked that the only limit to the arbitrary use of property was found in the arbitrary use of property by others. It was the arbitrary use of rights of each other that were arbitrarily limiting the rights of each other. If the owner of the mine does not mine the coal, nor does the landlord cultivate the fields, the right of property of both is secure, but their needs may compel them to use their property and restrict the activity of each other; but there is nothing in their right of property that obliges them to mine the coal or cultivate the field. There are no restrictions to assure that the ownership of property carries a public responsibility or that its *raison d'être* is not only income but service.

The social consequences of such an idea of property were felt

because of the miseries and brutalities it caused to the majority of the people within society. Especially is this so when such a conception of property is applied to industry, commerce, agriculture, etc., in short to the means of production, which are concerned with the instrumentalities which produce and distribute the goods needed by society to sustain itself. At stake, is then not the satisfaction and comfort of a few individuals but the well-being and standard of living of the society as a whole. It is inspired by these ideals, the resentment against the inequalities which the individualistic conception of property under laissez-faire theory furthered, under the guise of political and legal equality, that the protective measures were suggested. It is in this sphere of social organisation that dents were made in the two tier theory of property.

Another reason why the individualistic theory of property held sway for so long a time, was the attitude of the judicial courts who failed to see through social changes and had not realised the incorporation of social developments into legal institutions. President Roosevelt of the United States, in selecting Holmes to the Bench, made a revealing remark:

The labor decisions which have been criticized by some of the big railroad men and other members of large corporations, constitute to my mind a strong point in Judge Holmes' favor. The ablest lawyers and the greatest judges are men whose past has naturally brought them into close relationship with the wealthiest and most powerful clients, and I am glad when I can find a judge who has been able to preserve his aloofness of mind so as to keep his broad humanity of feeling and his sympathy for the class from which he has not drawn his clients. I think it eminently desirable that our Supreme Court should show in unmistakable fashion their entire sympathy with

all proper effort to secure the most favorable possible consideration ¹⁶ for the men who most need that consideration.

The partial and partisan attitude of the judges in taking social considerations into their judgements, led to resentment among the majority in the society to whom courts were the only impartial judge of their plight. This matter was put with candour by Lord Justice Scrutton when he stated:

The habits you [Judges] are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate a judgement as you would wish. This is one of the great difficulties at present with labour. Labour says: "Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?" It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class. ¹⁷

With such changes in thinking on the part of judges, it became easy to incorporate the idea of social purpose and public duty as forming a part of the idea of rights of property.

A third reason for the rise and growth of movement towards social responsibility as forming a part of the institution of property is found in the rise of nationalist movements towards the end of the 19th century. As Dietze states:

The decline of the individualistic concept of property as such, has been attributed to the emergence of nationalism

16. Frankfurter, F., "Property and Society", Science and Social Change, compiled by Thornton, J.E., Washington 1939, p. 446.

17. Ibid p. 448.

with its emphasis upon community-feeling.¹⁸

As the individualistic view of institutions fades before the growing claims of the community, the latter demands a reorientation of the relation between an individual and an object. The growing recognition of the corporate nature of society, implying a loss of individuality, also implies the depreciation of the 'absolute' rights of private property. With these developments, the idea of private rights were mixed with social responsibilities and thus the rights of property came to be considered as fulfilling a group function rather than an individualistic function. The idea of duties in relation to rights of property was conceptualised in terms of the social purpose of property. Ownership came to be seen as a 'three tier' relation - a relation between an individual and other individuals with respect to the object. Such a conception of property takes in perspective the limits which the law imposes on individuals in dealing with their respective rights and duties in the general interest. It is not only that the rights are called in question but that the duties imposed are to serve as proper limits to the rights. The duties imposed socialise the concept since they generate a conception of property as related to in social context. As Chaudhari states:

In a theory of property, as opposed to a theory of natural science, there is a normative level of operations in addition to what is usually called empirical or physical or material. It is in the operational process that property becomes more than a bundle of possible relations and is constituted as a fact of cultural existence.¹⁹

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18. Dietze, G., In Defense of Property, London 1971, p. 129.
 Friedmann, W., World Revolution and the Future of the West, London 1942, ch. v.
19. Chaudhari, op.cit., p. 278.

Friedmann expresses such a change from the unlimited exercise of the right of property to the right of property as a social responsibility when he states:

Political and legal ideology partly prepared and followed the general increase of public responsibility in social and economic affairs, by putting ever greater emphasis on social interdependence, responsibility, discipline, and duty, rather than on individual rights and freedom of economic competition . . . From the end of the nineteenth century onwards legal theory, as well as the trend of legislative and judicial development . . . emphasized the limits of property rights, and stressed more and more the duties of the individual towards his fellow-citizens and the community; at the same time jurists boldly denounced the notion of individual rights altogether and knew nothing but "the right to do one's duty".²⁰

The conservative idea that any interference with individual freedom is vicious, loosened its grip and state regulations were welcomed as strengthening individual liberty.²¹ Of this change Stone remarks:

20. Friedmann, W., World Revolution, op.cit pp. 77-78.

21. Professor Brown asserts that regulations promote the liberty of the individual. He cites four instances to prove that restrictions are the integral part of liberty and preservation of human life. He instances:

- 1) Restrictions upon each citizen in the interest of the liberty of all citizens;
- 2) Restrictions on the actions of the few in order to promote the liberty of the many;
- 3) Restrictions on the many in the interests of the liberty of the few;
- 4) The liberty of the individual may be promoted by restrictions that the state imposes upon him in his own interest.

All these four types of restrictions taken together supplement each other and show that it is only through the existence of such restrictions that an individual has any liberty. It is, therefore, more rational to say that liberty is only possible through the diminution of liberty. The negative aspect of liberty as immunity from governmental interference has its roots in the positive element of governmental regulation.

Brown, W.J., The Underlying Principles of Modern Legislation, London 1912, pp. 61-63.

The Progress of Continental Law in the Nineteenth Century, op.cit., p. 80.

The fallacy of supposing that a workman, living from hand to mouth on daily labour, resents legislative protection for his wage level and condition of labour in the same way as a great commercial or industrial corporation resents restrictions on its free bargaining, is now well recognised.²²

By the late 19th century the idea that rights have their social side was strongly pressing for recognition. Ihering declared:

All rights of private law, even though primarily having the individual as their purpose, are bound by regard for society. There is not a single right in which the subject can say, this I have exclusively for myself, I am lord and master over it, the consequences of the concept of right demand that society shall not limit me.²³

A similar idea has been expressed by Ehrlich when he states:

The entire private law ... inasmuch as it has an organising content, is social law ... the true individual rights are social rights ... ownership of the goods which it concedes to the individual is merely a result of this social order.²⁴

With the realisation of the social side of property²⁵ it ceases to be purely a concern of the individual. The individual is not free to do what he likes; society regulates the appropriation of property. The idea that the individual will suffer if he neglects or destroys his property is interpreted in terms of social consequences. What will happen if the individual neglects his mine, or his house and lets it fall, or neglects his fields? What will be the social consequences? To endanger the right, even the very existence of society? Since there is no individual

22. Stone, J., The Province and Function of Law, London 1947, p. 255.

23. Ihering, R.V., Law as a Means to an End, trans. Husik, I., New York 1968, p. 396.

24. Ehrlich, op.cit., pp. 53-54.

25. Ely, R.T., Property and Contract in their Relation to the Distribution of Wealth, London 1914, vol. i, ch. vi.

law, all law is social. No individual is an isolated being, nor does the law know such a being, the law always sees in man solely a member of a society, there is no interest which is not social.²⁶ There is nothing which is absolutely private much less the property which society must regulate to sustain itself. As Ihering states:

It is therefore not true that property involves in its "idea" the absolute power of disposition. Property in such a form society cannot tolerate and never has tolerated. The "idea" of property cannot contain anything which is in contradiction with the "idea" of society ... The principle of the inviolability of property means the delivery of society into the hands of ignorance, obstinacy and spite ... The interests of society are really your own; and if the latter interferes with your property and puts restrictions upon you,²⁷ it is done for your sake as much as for the sake of society.

By the idea of the 'social side of property' is not to be understood that it is a new discovery or a new appendix to the institution of property but rather a recognition of what was always inherent in the institution of property itself but was merely dormant and suppressed under social, political, and legal philosophy of different periods of human history. The regulating of the rights of property by the state was thus fully recognised as a part of the rights of property in modern times. But the first development came through the imposition of restrictions on the rights of property. In the first instance malevolence and harmful attitude in the use of property was restricted. As Gutteridge says:

The possibility that a legal right may be exercised

26. The suicide laws imply that an individual is not even free to put an end to his own life - life belongs not to man alone but to society as well. The abortion laws imply that a child from the very moment of his conception belongs to society.

27. Ihering, op.cit., pp. 389-390.

with impunity in the spirit of malevolence or selfishness is one of the unsatisfactory features of our law, and there would appear²⁸ to be a prima facie case for reform in this direction.

The law should prohibit the exercise of a right for a purpose which shocks the conscience of mankind in general. The regulation of the right of property by restrictions, so as not to permit injury to the right of others, is not an accidental phenomenon but a proper part of the right of property - when the right is inoperative without the restrictions then the right is non-existent. It can only operate within these restrictions since the very existence of a legally recognised right depends upon its exercise being consistent within its boundaries; if this were not so, the right would negate itself. The right belongs to persons and has no independent existence, social consequences are part of it and not merely accidental to it. But these restrictions do not socialise the concept of property but only demonstrate the social aspect of the right of property. The placing of limitations on the right of property from time to time is the way the society makes the rights of each individual consistent with each other. But this process is still a step short of socialisation. To say that exercise of a right is limited or not permitted, is simply saying that one may not do something that one has not the right to do. These restrictions are only to control the misuse of right rather than to promote some positive social purpose.

The concept of 'limitations on property' does emphasise the social aspect of the rights of property, but in fact it may well leave to the

28. Gutteridge, H.C., "Abuse of Rights", Camb. L.J. 1933, p. 22.

individual the despotic and sole rights within the limitations. It is only the means that were originated to avoid the consequences which logically follow if the concept of property is regarded as absolute. No doubt it narrowed the sphere of proprietary actions but limitations fail to explain the ground of the liability of the owner to promote social purpose. As Dugit explains:

To say that the abusive exercise of a right is not permitted, or further, that the law does not protect one who clearly misuses his right, is simply saying that one may not do something that one has not the right to do, or that the prerogatives belonging to a given right are being exceeded.

To abuse one's right is to exceed the limits of the right, thus abusing the right and exceeding the limits are identical. Thus the purpose of the restrictions were to protect the rights of the individual rather than to impose a social obligation. The limitations on the right intended to eliminate malice, selfishness, or wilful injury lead to psychological and ethical difficulties because it can in certain circumstances become difficult to prove that one has a malicious intention. Complexity of motives in performing an act will make it difficult to prove the wilfully injurious nature of the act. An objective criterion, free from psychological and ethical considerations, which externally manifests the character of the act will avoid the psychological and ethical difficulties. For example, the imposition of duty on the owner to promote social purpose - as in the case of a law providing that an owner who neglects his land is not worthy of being a land owner. This functional criterion

29. The Progress of Continental Law in the Nineteenth Century, Continental Legal History Series, vol. xi, London 1918, p. 142.

is neither ethical nor psychological, it carries with it a social purpose, as all organisations and institutions are formed with a view to fulfil a social purpose. The exercise of a right must conform to the social purpose of the institution which creates the right.

The conditions of the new social economy made it increasingly clear that the growth and development of society lay in the rightful use of natural resources and elimination of waste, which under the individualistic philosophy was left as a matter of private concern. It is this pressing social problem together with political and other causes which brought the social aspect of property into predominance. The idea that society will adjust itself by its natural mechanism (by physical laws of Newtonian physics and biological laws of natural selection which the individualistic philosophy applies to society because it believes that society is a causal mechanism rather than based on human laws of purpose) showed signs of decay and was abandoned in favour of various social techniques designed to ensure that the economic life of the community is a social 'mechanism' rather than a natural 'mechanism'. Social methods, by introducing planning in economic life to avoid ruthless exploitation and waste, were introduced which led to social stresses on the right of property. Not only static property was attacked, the free use of property was restricted. Even the freedom to acquire property was restricted. A new social conception of property was emerging and was consciously emphasised and was carried into practice - limiting the conception of property within the bounds of welfare of the general public. As Kruse states that the right of property, in the modern world, is

the driving force in the economy of the community, of its widely diffused economic mechanism, of the production, distribution and credit of society, with their numerous carefully co-ordinated sections.³⁰

Because of such diffusion in the economic mechanism, Kruse favours restricting this mechanism which otherwise exploits the economically weaker sections of society. He cites an example of such financial exploitation in cases of hire purchase agreements.³¹ To avert such economic exploitation by the short sightedness of private capitalism, Kruse suggests, not the abolition of private property nor state monopoly but control, guidance, and regulation through legal intervention. Law is an appropriate means for such regulations.³² Limitations and regulations of the economic functioning of the right of property will transform the right of property to its true subsistence function by limiting it to the right of use rather than accumulation of wealth, as he states:

In view of these limitations it is difficult to describe the right of the actual holder of the estate as a right of property; it would be more true to regard it as a right of use.³³

With the growing emphasis on the social aspect of property, the idea that the institution of property is a social product and its purpose is social interest was fully established. Restrictions on the conception

30. Kruse, F.V., The Community of the Future, London 1950, p. 436.

31. Kruse, The Right of Property, translated by Philips, D., London 1953, vol. ii, pp. 21-22.

32. Kruse, The Right of Property, trans. Federspiel, P.T., London 1939, vol. i, book iii, pp. 165-238.

33. Ibid p. 245.

of property were considered as an intrinsic part of the conception itself rather than a gloss on the institution of property. The writings of Ihering, Ely, Kruse, etc. laid stress on the social aspect of property, that the institution of property is to serve social interests, and advocated writing regulations into the definition of property that would do justice to the idea that property is a social good. The idea that property is not entitled to absolute protection but implies social duties for the interest of the community was recognised. Such an approach characterised by greater realism eliminated those incidents of the right of property that led to the abuse of the right of property, and strengthened the individual's right over his property rather than weakened his right as Dietze³⁴ claims. This social evaluation of property brought socialisation of property by imposing on the holder of property social duties in the form of restrictions as to avoid waste and destruction of property. Thus the proprietor is prohibited to use his property to the detriment of society. It also prohibited the malicious use of property for the purpose of injuring one's neighbour, for the right of property is not recognised for the sake of injuring others. It is recognised that though an injury to a neighbour is not directly injurious to the public at large, there is a public interest in restraining such injuries. Thus the social aspect of an individual's right of property which was previously only favoured in case of state necessity by expropriation, under socialisation became a common feature in respect of each individual. Now individual property stood against

34. Dietze, G., In Defense of Property, London 1971, pp. 108-115.

individual property not as individual to individual but as a condition of social well-being. Individual life is regarded as a coherent whole participating in the social milieu for the furtherance of a true individuality. It is not a case of each seeking his own interest like a hermit irrespective of his social milieu. Socialisation is, thus, the moulding of the concept of property with reference to social functions. For example, under zoning laws, the state may restrict the use of property in the area where spillover affects the health of the public. Such a restriction reduces the value of property, indeed it may deprive the property of its value and cause an economic loss to the owner. This deprivation is a social reservation whereby an obligation is imposed on the owner as a condition of his right of property. The application of his right is limited by the function it performs in society. As Cohen states:

To permit any one to do absolutely what he likes with his property in creating noise, smells, or danger of fire, would be to make property in general valueless. To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state.

To say that the function of the institution of property is developed on a social basis is to assign to the institution of property a teleological basis. There must be some social purpose which is the basis of the function of the institution of property. As every institution in society has a purpose which determines the main lines of its growth, so the social purpose for the institution of property has become its function.

35. Cohen, M.R., Law and the Social Order, New York 1933, p. 57.

As the origins of the institution presuppose some specific and intelligible purpose for it calling the institution into being, so the functions of the institution, however they may change and develop, are in the last resort also specific³⁶ - and in the case of the institution of property, the development of the institution is set on a social basis as determining its function.

The study of the institution of property with reference to its function opens up the prospect of a property objective study. The new social philosophy looks at the institution of property with the aim of establishing an objective criterion of social well-being. The owner is expected and obliged to use his property for the social interest. This does not mean collective ownership but establishing of a collective and coherent relationship between the individual functioning and social well-being. In discussing such an approach to the institution of property, which establishes an objective criterion for the functioning of the right of property, we must realise that the development of public policy would not have been possible without the support of jurists. The juristic attempt came through a number of different quarters, from Germany, France, America, etc., some of which I propose to discuss in this chapter.

36. Cole referring to social function and social purpose states:

Social purposes are, thus, the raw material of social functions, and social functions are social purposes selected and placed in coherent relationship.

Cole, G.D.H., Social Theory, London 1920, p. 54.

Duguit

Duguit saw in the social changes that took place in the wake of industrialisation that the force of events and practical needs were actually creating new legal conceptions. The appearing of new legal conceptions is a constant and spontaneous product of events - and thus legal conceptions are essentially social conceptions. He rejects all metaphysical notions such as rights of man and freedom of will.³⁷ He states that all rights are objective and presents a legal situation in which individuals achieve certain advantages in the performance of certain acts. And acts derive their validity from their social character. Thus the existence of a right is the performance of a social function towards others, that is, no one possesses any right save that of always doing his duty.³⁸ Duguit states:

The individual has no rights; neither has a group of individuals. But each member of society has a certain function to perform, a certain task to fulfil. It is precisely this that underlies the rule of law which is prescribed upon everyone, great or small, the governing and governed.³⁹

Each individual as a member of society has a function to perform. The owner has a social function to perform. For example, if an owner

37. Duguit says that subjective right is a power that consists in imposing one's will on other wills. Since man is a social being and can only live in society, there can be no such right as based on subjective power, but it is only objective law which determines and gives validity to rights and not subjective will. He excludes the human free will from the domain of legal transactions.

38. The Progress of Continental Law in the Nineteenth Century, Continental Legal History Series, London 1918, vol. xi, p. 71.

39. Ibid p. 73.

leaves his land uncultivated or allows his house to fall into ruins, the state steps in and is justified in obliging the owner to perform his social function as a property holder. Duguit states:

The right of property exists and must exist. It is the indispensable condition upon which rests the prosperity and greatness of society ... But property is not a right; it is a social function. The owner, that is to say the possessor of wealth, by the fact of his possession, has a social function to perform.⁴⁰

In a society where each is to function, the principle of social interdependence is the basis of Duguit's theory. Social interdependence is not a conjecture but an existing fact. It is not a sentiment, not even a principle of conduct; it is a fact of the social structure itself. All acts and institutions are to be judged and protected according to how they contribute to the fact of social solidarity.⁴¹ This realistic and social basis is the specific rule of law or 'objective law', for preserving a cohesion between the different elements that compose society through the accomplishment of the social functions.

Duguit's approach rejects all individual rights - an individual as such has no rights, powers and liberties; instead he performs duties and obligations. Under social solidarity, liberty is not a subjective

40. Ibid p. 74.

41. Duguit attacks all those conceptions of state and sovereignty which personify the state. He is not against organised associations but describes the movement towards decentralisation - all associations are working towards social solidarity. If all associations including state are working for social solidarity then how is the state different from other associations? All organisations have a duty to fulfil a social function - to organise public service, which represents collective purposes, to assure their continuity and control their operations. Once they cease to promote social solidarity, a duty to revolt against them arises.

right but a result of the obligation resting upon each one to develop his individuality, that is to say, his physical, moral, and intellectual activities as fully as possibly in order to co-operate with all his forces towards social solidarity. Duguit justifies factory legislation because it is to protect the individual from all dangerous situations involved in factory work, and thus for the safety and health of the community. It is useless to oppose factory legislation on the basis that it interferes with the liberty of the individual. By imposing measures of safety, the legislator protects human life as a social asset.

Duguit advocates that property should meet what he regards as economic needs. In modern communities the road to meeting economic needs is ever-stricter interdependence of the various elements. In this way property is socialised. That does not mean it is becoming collective in the economic sense, but as he states:

It means two things: first, that private ownership is ceasing to be a private right and becoming a social function; and second, that those instances of the application of wealth to collective uses which should be legally protected, are becoming more and more numerous.

The institution of private property, in so far as it survived, could only be justified as a means of applying wealth to the differentiated purposes required in an economically complex society. Duguit states:

Today ... if the application of wealth to individual uses is protected, it is above all because it benefits society ... Law no longer protects the so-called subjective right of the owner. It guarantees to the possessor of wealth the liberty to fulfil the social

42. Supra note 9, pp. 129-130.

task incumbent upon him by reason of his wealth.⁴³

Duguit does not advocate the abolition of private property but maintains that by performing social functions, private property will attract greater protection. The movement of law is towards collective and coherent action in fulfilling social purposes. Society will protect actions if the owner's action is in performance of social duties.

Duguit advances reasons why the individualistic system of property is breaking down. He says that the individual is not an end in himself but only a means. He is a wheel in a huge social body, and his only reason for existence is performance of his part in the labour of society. The individual system of property is vanishing because its only purpose was to protect the application of wealth to individuals' interests. Duguit rejects the classical conception of property. He believes that all interests are social, and advocates the imposition of high taxes on the rising value of land brought about by collective achievements of society. This is justified because this increment is not due to any act of the owner.⁴⁴

43. Ibid. p. 134.

Similarly Tawney states:

Society should be organized primarily for the performance of duties, not for the maintenance of rights, and ... the rights which it protects should be those which are necessary to the discharge of social obligations. But duties, unlike rights, are relative to some end or purpose, for the sake of which they are imposed ... The former are a principle of union; they lead men to co-operate. The essential thing, therefore, is that men should fix their minds upon the idea of purpose.

Tawney, R.H., The Acquisitive Society, London 1921, p. 96.

44. Ibid pp. 136-138.

A similar view has been expressed by Hobson who believes that all values are the results of social manifestations.

Hobson, J.A., The Social Problem, London 1901, ch. vi.

Renner

Renner analyses the decisive change in the course of the development of the institution of property, the economic function of which in a capitalist economy has become entirely divorced from its legal meaning. This break up of the unity of ownership is posing a hindrance to the socialisation of property because effective economic ownership and legal ownership are under separated control. The break up of the unity of ownership has diverted property from its purpose, the satisfaction of the economic needs of each individual, and thus has led to the abuse of the right of property and made it anti-social. Property, in modern times, he states, is not a mere order of goods, it has become a dominium over persons, an imperium.⁴⁵ While in former conditions, of simple commodity production, ownership meant, on the whole, unity of control, work, and enjoyment; the capitalist economy has separated these functions. The capitalist industrialist can command the services of wage-labourers who are, in law, his equals, who bind themselves by contract of mutual obligations, but who are, in fact, subject to the disciplinary power of the capitalist. Property has become personal power. Renner, quoting Marx, states:

It is not because he is a leader of industry that a man is a capitalist; on the contrary, he is a leader of industry because he is a capitalist. The leadership of industry is an attribute of capital.⁴⁶

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45. Renner states that this development of the institution of property has become so organised that it has become similar to the state. It has become a power to issue commands and enforce them. He, in fact, gives a warning against this new role of the institution of property.
46. Renner, K., The Institutions of Private Law and their Social Functions, trans. A. Schwarzschild, ed. O. Kahn-Freund, London 1949, p. 107.

All institutions are entrusted to perform a specific purpose, and the obligations on the members of society are imposed with the idea to carry out that purpose. Renner insists that the institution of property is entrusted with the function of performing economic functions and it is an obligation of the members of society to fulfil their economic needs through the institution of property. But under the capitalist system if a member of society does not exercise his right of property with respect to a res, that is, if he does not make the economic use of his property, for example, does not cultivate his land but leases it to someone, he is still the owner of land. He is the owner of his land not because of the economic use of the land but because of his legal rights. Thus a simple economic category is equivalent to a combination of various legal categories, there is no point to point correspondence. A number of distinct legal institutions serves a single economic process. There is thus a clear divergence between the economic aspect of property and the legal contents of it. Renner's main theme is the adjustment of legal contents to the economic contents, and by economic contents, he means, the detention of a res for one's appropriation.

All this explains the relative lack of purpose to carry out the obligation by the owner because in the present legal context he remains an owner without the economic detention of the res. But by virtue of his legal ownership, he wields power over those who enjoy the economic detention of the res. This places the legal owner in a position through the abstract control of res to the actual control of human beings who derive the economic control through his legal title. Renner states:

In the eyes of the law, the property-subject is related to the object only, controlling matter alone. But what is control of property in law, becomes in fact man's control of human beings, of the wage-labourers, as soon as property has developed into capital. The individual called owner sets the tasks to others, he makes them subject to his commands ... The owner of a res imposes his will upon personae, autonomy is converted into heteronomy of will.⁴⁷

The right of ownership thus departs from being an economic satisfaction of an individual and assumes a new social function of issuing commands similar to the state. This power of control over human beings in carrying out the functions of production and distribution, which is a social necessity,⁴⁸ becomes a rule not for the purpose of protection but for exploitation and profit to the owner. These developments show that the institution of property has been subverted from being an order of things. It merely protects him who has possession by virtue of an unassailable title, but it does not distribute goods according to a plan. This divergence between legal property and economic property has led to the abuse of the institution of property and thus the

47. Ibid p. 106.

48. In explaining the need for power of control as a social necessity, Tawney states:

No one complains that captains give orders and that the crews obey them, or that engine-drivers must work to a timetable laid down by railway-managers. For, if captains and managers command, they do so by virtue of their office, and it is by virtue of their office that their instructions are obeyed. They are not the masters, but the fellow-servants, of those whose work they direct. Their power is not conferred upon them by birth or wealth, but by the position which they occupy in the productive system, and, though their subordinates may grumble at its abuses, they do not dispute the need for its existence.

Tawney, R.H., Equality, Open University edition, London 1964, p. 113.

functioning of the institution of property has become anti-social in its essence.⁴⁹

Renner asks how this development where the owner, as at present, is far removed from the process of production can be remedied. How can the institution of property be restored to its real position where there is unity of legal property and economic property? Renner does not advocate the abolition of the institution of property, which he believes can never be abolished,⁵⁰ but suggests that the anti-social activities which have crept into the institution of property can be remedied by control, guidance and a regulatory legal order.⁵¹ It is the legal order itself that can make the legal ownership correspond to economic ownership. The present chaos within the institution of property is because of the fact that the norm of the institution of property has remained

49. Renner, *op.cit.*, p. 279.

50. Renner, *op.cit.*, pp. 278-279.

51. Renner states:

All property is conferred by the law, ... with the power of disposal over corporeal things; but now the corporeal object controls the individuals, labour-power, even society itself ...

The norm is the result of free action on the part of a society that has become conscious of its own existence. The society of simple commodity producers attempts to stabilise its own conditions of existence, the substratum of its existence, by means of the norm. But in spite of the norm, the substratum changes, yet this change of the substratum takes place within the forms of the law; the legal institutions automatically change their functions which turn into their very opposite, yet this change is scarcely noticed and is not understood. In view of all this the problem arises whether society is bound to change the norm as soon as it has become conscious of the change in its function.

Renner, *op.cit.*, p. 293.

constant while the substratum has changed. The legal institution reverses its original function without any active participation of the law itself as soon as there is a change of the actual substratum of the legal institution. In the case of the institution of property, Renner states:

Norm and substratum have become so dissimilar, so incommensurable, that the working of property, the way in which it functions, is no longer explained and made intelligible by the property-norm; to-day we⁵² must look to the complementary institutions of property.

Renner's analysis shows that the legal institution of property in fact has ceased to function by losing its independence and self-sufficiency. It is only by constantly working in association with other legal institutions that ownership can now fulfil its function. Since the social function of property is not now relevant to the right of property, and it is society that is to determine the function of her institutions, there is a growing tendency towards a new social recognition that capital must be brought under control of society. Regarding recent developments, Renner states that public duties have been imposed on the property holders, though these have not made property public. The landowner must cultivate his land or some other person seizes it for cultivation, he must sell, he must charge the controlled price instead of the market price, he must dispatch his corn to the railway or mill, and so forth.⁵³ These developments have not socialised property because the control of things has remained in the will of private individuals. Renner states:

52. Ibid p. 290.

53. Renner, op.cit., pp. 120 & 155.

The function of the right in rem is not revealed by persons or res alone, nor by the legal power of the persona over the res, which is merely freedom of action granted by the law. Its function is revealed in the active use of the right, in the manner of exercise; which in most cases lies outside the sphere of the law.⁵⁴

Restrictions on the right of property still leave the individual as a de jure controller over the object, for these do not establish the way for the relations among men and nature to be such that every person and every object may have its functions openly established and may fulfil them in a straightforward manner. This task can only be achieved when all complementary and supplementary institutions appended to the institution of property will cease to be the 'hand maidens of property'.⁵⁵

The socialisation of property, is fully realised, according to Renner, when the res, if it is made fully available for the use of mental or manual labour, and if it is a means of consumption, is given over to the use of the consumer. If the owner cannot use a machine or a landowner cannot cultivate the land he must give up detention in order to put the object at the service of society. This will deprive the owner from making the technical use of property by act-in-the-law, if he does not know the economic use of it. Renner states:

The legal system must make provision for giving the things into the detention of those who have the technical means of controlling them, otherwise society would cease to exist.⁵⁶

54. Renner, op.cit., p. 267.

55. Renner, op.cit., p. 298.

56. Renner, op.cit., p. 268.

A similar argument is advanced by Aristotle when he says that the instruments should go to those who can use them and know the use of them, and not according to any superiority of birth.

Aristotle, Politics, book iii, ch. xii.

In establishing such a legal order, the complementary and supplementary institutions will become the principal institutions and the institution of property which is playing a major part will be abolished without any disturbance to the economic process.⁵⁷

Berle and Means

Berle and Means suggest the socialisation of the power of the corporation for the interest of the society. They emphasise that the growing power of corporations is to be controlled since it is trying to compete with the power of state.⁵⁸ The concentration of economic power in the hands of the corporation thus needs to be checked by imposing social duties, so that the passive rights of corporation must yield to the larger interests of society. They hold that this change can be brought by introducing a wholly new concept of corporate activity, and they stated:

Neither the claims of ownership nor those of control can stand against the paramount interests of the community ... It remains only for the claims of the community

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57. Renner states that modern legislation relating to normal working hours, factory inspection, protection of women and children, insurance against sickness, accident, and old age, public labour exchange, etc. are replacing the complementary institutions of property. And keeping these in view, he states:

Should we not come to the conclusion that the process of change towards a new legal order has already begun, that the complementary institutions already pre-shaped in the framework of the old order will become the principal institutions so that the institution which has previously played the principal part can be abolished, without any disturbance of the economic process, in so far as it no longer serves a useful social purpose?

Renner, op.cit., p. 295.

58. Berle, A.A. and Means, G.C., The Modern Corporation and Private Property, New York 1967, p. 313.

to be put forward with clarity and force. Rigid enforcement of property rights as a temporary protection against plundering by control would not stand in the way of the modification of these rights in the interest of other groups. When a convincing system of community obligations is worked out and is generally accepted, in that moment the passive property right of today must yield before the large interests of society.⁵⁹

In their analysis of modern corporations, they revealed the separation of ownership from control and assigned the respective position of ownership and control while stating:

Power over industrial property has been cut off from the beneficial ownership of this property ... Control of physical assets has passed from the individual owner to those who direct the quasi-public institutions, while the owner retains an interest in their product and increase.⁶⁰

And they further stated:

The owner is practically powerless through his own efforts to affect the ... property ...

Finally, in the corporate system, the "owner" of industrial wealth is left with a mere symbol of ownership while the power, the responsibility and the substance which have been an integral part of ownership in the past are being transferred to a separate group in whose hands lies control.⁶¹

And the logical outcome of this separation is the

Ownership of wealth without appreciable control⁶²
and control of wealth without appreciable ownership.

They show how with the economic changes and the development of market economy, the control previously carried with the ownership has now largely passed to those who, without being owners, can control and direct the enterprise. Under these conditions it is no longer guaranteed that the corporation will run in the interest of the property

59. Ibid, p. 312.

60. Ibid, p. 8.

61. Ibid, pp. 64-65.

62. Ibid, p. 66.

holders.⁶³ This has destroyed the unity of ownership and has divided ownership into nominal ownership and the power formerly joined to it. The property owner has thus become a mere recipient of dividends or recipient of the wages of capital.⁶⁴

Economically both control and management are wedded to the physical property. Under corporate ownership the owner has neither direct personal relationship nor responsibility towards it. As they state:

Most fundamental of all, the position of ownership has changed from that of an active to that of a passive agent. In place of actual physical properties over which the owner could exercise direction and for which he was responsible, the owner now holds a piece of paper representing a set of rights and expectations with respect to an enterprise.⁶⁵

They, however, reject the total abolition of private property in the means of production and advocate that by protecting the rights of property in the means of production, the acquisitive interests of man could thus be more effectively harnessed to the benefit of the community. But ownership in the means of production must carry with it social obligations as over-riding individual interests. This is possible only if social obligations as comprising fair wages, security of employees, reasonable service to the public, and stabilisation of business, etc. form a charge over the passive interests of owners. As they state "public policy" to serve the community must over-ride "private

63. Ibid p. 293.

64. Ibid p. 5.

65. Ibid p. 64.

cupidity",⁶⁶ Thus their plea is not for abolition of private property but for the maintaining of social purpose as the basis of the rights of property.

Conclusion on the Socialisation of Property

The institution of property is socialised by imposing social duties on the individual in the general interest. The individual is to dispose of his property so as to further social interests. The old doctrines that an individual may so use his property as not to injure his neighbour maintain, not the general interest in view, but the individual's self interest as its end. The owner is already restricted from acting entirely in accordance with his own desires as that would lead to chaos in the life of the community. The legal order that controls economic activities and furthers social interests is thought the only alternative to laissez-faire. That involves the transformation of individual rights of property into a social function by attaching the idea of social duties to the idea of property. Society and the social interests are interposed between the owner and the object. The right of property no longer concerns solely the individual and the object, but also the social surroundings from which it takes its existence. Society concerns itself with the influence exercised on the social environment by the relationship between the individual and the object. The absolute and subjective right has become a right which is no longer absolute but is limited by social constraints. Under socialisation the contents of property have been gradually extended to include the

66. Ibid, p. 313.

concept of a social function, with the inevitable effect of bringing it closer to public law. The process of modification of property displays three special features according to Katzarov:⁶⁷

- 1) the introduction of a social function into the content of property;
- 2) the division, or "fragmentation", of property into a number of categories with differing contents and enjoying differing protection (such as personal, private, cooperative and collective property); and
- 3) the incipient elaboration of the concept of "community property", "people's property" or "socialist property".

The changed structure of the institution of property of which the dominant idea is that all property has a social function leads to the idea that property is restricted to and limited by the needs of society. In modern legal systems the idea of social purpose is increasingly occupying a dominant role behind judicial interpretations. For example, in case of bankruptcy, the exemption of the debtor's house, clothes, his tools for work, part of his earning necessary for his living, etc. from attachment is the result of the social purpose ascribed to the idea of property. The debtor's personal obligations were abolished under humanitarian considerations, and now his useable assets necessary for his living as a source of his subsistence are exempted from debt obligations on grounds of the social function of property. The leniency and favourable attitude of the courts towards squatters gives credence to the idea that judges are coming to recognise the social function of

67. Katzarov, K., The Theory of Nationalisation, The Hague 1964, p. 116.

property. Under the stress of socialisation of law, the Supreme Court of India ruled out the possibility of waiver of fundamental rights⁶⁸ granted under the constitution. The rights granted to the individual are regarded as serving not only his well-being but also the wider and general interest of the society. Similarly in cases of expropriation of property by the state for public purposes, the full compensation is not mandatory; whatever compensation is fixed by the state, its adequacy is not justiciable in the court of law.⁶⁹ The most evident proof of the public interest in property becomes clear when compensation is fixed not only in the interest of the proprietor but also those of society. The idea behind such a provision is that the property subject to acquisition or requisition is recognised to have a social function and the compensation is to be given on the basis of the importance of the element of social function. Compensation which takes account of the social function of property and the general interest of the community (there is every reason to think) can not be based on the principle in favour of the owner's right to 'full compensation'.

The admission and recognition in contemporary law of the social character and function of property is an accomplished fact. This means that the socialisation of institutions is determined by the needs of society as perceived by those who control legal systems. Every legal institution as a part of the social function, thus, represents a part of the organised legal order and does not represent separate

68. The Constitution of India, article 13.

69. The Constitution of India, article 31(2).

departments of individual and social activities as was believed in the individualistic period. Renner states:

If we correlate all specific effects of a legal institution upon society as a whole, the individual partial functions become fused into a single social function.⁷⁰

Socialisation does not mean collectivism nor does it mean the abolition of private property. It, as indicated earlier, only means attaching of distinct social functions to the rights, and in this essay, refers to the rights of property. It needs to be differentiated from nationalisation which is also a form of socialisation, but is a special type of socialisation. In the case of 'socialisation' as used here, property remains private, but the owner is burdened with social duties to further social ends. He cultivates or is forced to cultivate land not because he needs it for his own profit, but because the presumed social interest demands that land should not lie uncultivated or deserted. In the case of nationalisation, private property changes its nature. It becomes public or state property. It vests in the state - though the end of public property remains the same, namely a presumed social purpose. The objective criterion which justifies the functioning of the rights of property does not change. It is the legal person that changes. One can describe nationalisation as a process of depersonalisation of property.

The fundamental tendency of nationalisation is the transfer of certain categories of property and economic activity to the state and their utilisation in what is conceived as the collective interest. The

70 Renner, op.cit., p. 75.

transfer tends to orient legal relations towards collective ownership and collective interests. In such a system all production is cooperative, each individual participates with the other, so that each is in turn a member of every other. Katzarov explains the collective element and general interest in nationalisation when he states:

One of the most important social and political elements which influence the process of nationalisation is not merely the desire to withdraw an activity or a class of property from the private domain and to confer it on the community, but is actually a different attitude towards economic affairs as a whole. This new attitude finds expression when it is stated as a ground for nationalisation that an undertaking being nationalised "has not hitherto been operated as it should have been in favour of the community", or, less strongly, that it "would⁷¹ be better operated if it were in communal ownership".

It is with a view to the preservation of natural resources and the avoidance of waste, the distribution of production and income with a view to reducing disparities of wealth between social classes that nationalisation is devised as an alternative to private property in the means of production. It is economic growth, coupled with concern for the general interest of the community, that is the basis of nationalisation - for growth alone may leave behind pockets of poverty and disrupt the life patterns of the majority of people. The notion of expansion of the economy is made to harmonise with the idea of social welfare. It is based on the idea that it is an obligation of the state to secure each person's 'right to work' since the idea of the state as an institution which has its basis on the idea of justice is getting greater and greater significance in modern times. To meet such obligations the state

71. Katzarov, op.cit., p. 171.

resorts to nationalisation in the hope of making the economic life of the community be geared towards common interests.

Nationalisation is devised as a means of socialisation, solely relating to economic interests. The state, wholly or partially, withdraws from private ownership certain economic assets which are thought to be essential for collective utilisation - the idea is that certain resources and certain economic activities cannot and should not be the object of private ownership or the object of private interest. The object of nationalisation is thus the utilisation of a given economic asset in the general interest. It results from a conception of property which has evolved appreciably, according to which ownership is no longer limited to a bilateral relationship between the proprietor and the subject-matter of the property, but constitutes a trilateral relation between the proprietor, the subject-matter and society.⁷² The reason for the movement towards nationalisation is found in the growing consciousness of the economic basis of legal problems and the role of economics in human life. Social well-being is seen as the basis of the right of property and the specific means of securing this end, though necessary, have become of secondary importance. Katzarov, keeping this in view, states:

Basically, the transfer of property to the state by nationalisation is of secondary importance only, since it is merely a means of attaining the desired end, namely the organisation of production and exchange on socialist principles in the exclusive interest of society.⁷³

72. Katzarov, op.cit., p. 159.

73. Ibid p. 142.

CHAPTER 7

CONCLUSION

It is difficult to come to conclusions on a subject like ownership since with both material and intellectual productions the process of development never comes to an end. The main point to be made in these concluding remarks is that every successive 'phase' of social development which we may identify is in fact inseparably connected with its precursors and successors, and that in any such 'phase' the institution of property, is made to serve individual needs. Whatever be the developments of the institution of property, the basic and most fundamental idea, that each individual should have sufficient goods to meet his needs, cannot be lost sight of, if the institution of property is to be preserved and continued. With all developments, from primitive to mediaeval to modern, we have found changing conceptions of property shaped by differing social, economic, and political forces. But the predominant function of the institution of property has always been and will always be to fulfill economic needs or demands asserted by persons in society. Whether one or the other development of the institution of property is more consistent with the idea of liberty or to what degree human society needs an institution of property, the economic function of the institution of property has always remained basic to it. Whether the legal order working under a given political system has been made to serve the needs of each individual or a small section of the society is a different question - the survival of the institution of property is marked by its function in fulfilling economic needs, and this is essential under all legal systems.

If one were to speculate about the first steps of human history, one would certainly infer the need of appropriating out of nature, the material which was most basic to human survival. It is the appropriation of this material that is necessary for the survival of the human race that constitutes the idea of property. Similarly the successive developments in appropriating the means of production, like land, in whatever vague form, out of which the specific form later developed, is the beginning of the idea of property. Thus property is the 'thing' capable of serving human interests if he is to survive. Sumner states:

Property is 'sacred' ... because it is the actual and indispensable basis of the existence of men in society ...

Men live in order to live, and property is the support of existence ... To assail it is to assail existence.

The different types of 'things' that constituted property in the course of the development of the institution of property have this characteristic of being means to fulfil individual needs; and its various forms depended upon the life-conditions of the given society. As the life conditions change, the different variations in the institution of property became apparent. But despite all its variations, and despite all its new additions and subtractions to the category of 'things' from the contents of ownership, the basic idea of the institution of property as serving individual needs remained constant and firm - since it is the life essence for the survival and continuation of the institution of property.

1. Sumner, The Science of Society, London 1927, vol. 1, p. 349.

The making of provision to support life is in some sense the reason for which the institution of property came into existence and is surviving. The life of labour, the drawing of subsistence for individual needs, are all elements of the institution of property. The only universalisable end which can be ascribed to the institution of property is that of fulfilling the needs of each individual. The right of property is a guarantee to each individual for his survival so that he can get the necessities of life; and the kind of property which excludes others, as from the means of production, when everybody is equally entitled to it, is unjust. There have come into existence various kinds of property which are far removed from the basic idea of providing subsistence to each individual and have made him depend on others for his necessities of life. As a result the freedom of individual, that is necessary to individual life, which comes through the control over things to meet the necessities of life, lost ground to the institution of property itself through its various developments. The juristic development of the idea of property has perverted it from the basic (and innocent) idea of providing to each the means of his subsistence free from the control of others. Thus the kind of property which deprived the majority of the people of their subsistence, and thus of their freedom as well, is against the very idea of the institution of property which established individual control over things for each person's own use. Bentham's savage in a cave who by the introduction of the institution of property became free from being robbed of his dead deer, in reality lost all his freedom as well as right to subsistence with the juristic developments of the institution of property.

When the liberty of each individual is considered necessary to the development of his personality, and property is conceived as an extension of personality over external objects, the confusion between the two, property and liberty, reaches a point where liberty merges into property through the notion of freedom of contract, and the perceived distinction between the two effectively vanishes. As a result of this development the institution of property (though still characterised as serving the economic needs of all) became an instrument of oppression in the hands of those who acquired more wealth than their needs required. The institution of property came to serve the economic needs of a minority at the cost of the majority. It is not that for the majority it ceased to exist, but it ceased to function directly. The owner of wealth stood midway between production and consumption, with power to direct both production and consumption. The normal role of property was in abeyance only for that intermediate stage. But its real function of distributing goods for consumption did not stop - such a stoppage would mark the end of the institution of property. Liberty is destroyed in an actual sense, since a mere formal presence of abilities to acquire and transfer property may be of little or no worth to the great mass of the poor. (If the institution of property is presumed to merge in the idea of liberty, and liberty gains as much strength as is gained by the institution of property the result will be total chaos.) The important thing is to realise a system of property in which ownership is a means of serving the personal economic needs of an individual rather than for giving him power over others. Property so conceived

can preserve its independence as an institution even under the variability of circumstances. Thus what is necessary to continue the existence of the institution of property is maintaining a sense that the institution of property serves a legitimate purpose, that is, fulfilment of the economic needs of each individual under all variable circumstances. The justification of the institution of property is to be found in this purpose or functional activity where it serves the economic needs of each individual rather than in an activity where the institution serves a section of the community and leaves the majority to depend on that section, rather than on possession of sufficient property of their own to serve their economic needs. Thus what is necessary to preserve the institution of property is its capacity to fulfil each person's economic needs under variable circumstances - in any system whatsoever. But such a recognition and realisation is possible only if we first realise that the institution of property which does not fulfil these economic functions is not a wise and inevitable system but one guaranteed to subvert the institution of property itself. We shall not grow wiser unless we learn that much that we have done was very foolish. Only such a realisation would establish the intrinsic value of property and lead to a condition in which no one would dare to say:

Wealth is drawn up by ropes of wealth, thus money bringeth money . . . O vanity of vanities, yet no more vain than insane. The church is resplendent in her walls, beggarly in her poor. She clothes her stones in gold, and leaves her son naked.²

It is not intended to denigrate the importance to each individual of

2. From a letter of St. Bernard, c. 1125 quoted by Tawney, R.H., Religion and the Rise of Capitalism, London 1926, p. 29.

fundamental rights such as freedom of speech, freedom of religion, etc., but it is unlikely that a hungry man would be particularly excited about his freedom.³ The important thing is to realise a system of ownership in which property as a personal asset, a source of freedom, can preserve its independence in its sphere of its personal use rather than becoming a subversive element in the social order as a source of authority over men.

Individualistic philosophy tends to justify property in conformity with its basic tenets that man is by nature an isolated being and his gregarious instincts are the results of social and physical compulsions. With this view the idea that the good of each man will lead to the good of society as a whole became the spring-board for individualistic doctrines. When this philosophy was applied in relation to the institution of property, the individual was allowed to enjoy an entirely free hand in his economic affairs. Man by his ingenuity invented such uses of his property as loan, lease, etc., that superior wealth became a form of superior power. Economic power became a ladder to political power and thereby made these inventions property themselves. With the growing complexities of society by new inventions in industry, the individualistic philosophy turned against individuals and a major section of society was deprived of the individual freedom, which was so dear to the protagonists of individualist philosophy. The old restrictions on the individual's free movement and economic bondage were replaced by freedom (which proved an empty frame), yet this made no substantial change in

3. Rawls, J.A., A Theory of Justice, London 1973, paperback, p. 204.

opportunities of real self development. He could not avail himself of or realise the worth of freedom because the change was a change within the forms of socio-legal systems rather than a change of substance. The individual's plight under the freedom of property and freedom of contract, the two main elements in capitalist economic activity, did not make a fresh start for the majority because the majority was not given property enough to make a fresh start. Those who speak of an unbroken line of development so far as the substance of the right of property is concerned have therefore a good deal of truth on their side. There was a break but an attempt to make a fresh start with rights of property failed. Instead, a consequence of this change was the development of the complete supremacy of the rights of property.

The advocacy of freedom of property coupled with the idea of liberty came under attack when increasing national wealth through industrialisation failed to show a parallel rise in the general welfare of the people. Social minded jurists, lawyers, and economists, though defenders of the institution of property, attacked the neglect of general welfare which marked the capitalist economic system. The depreciation of property that took place in the wake of such a social movement sowed the seed for the imposition of social duties on the ownership of property. The idea that the institution of property is to serve the economic needs (any generation's conception of needs is shaped by the urgencies of life and therefore each generation has to undertake anew this task of reinterpretation if it wishes to uphold its claim to share in the constant renewal of civilised values) and therefore is the basis of subsistence became a scientific, political, and legal notion involving the problems

of health, education, housing, pensions, etc. The origin and strength of these claims through the institution of property represented a social revolution. However distasteful such an admission may be, we must "recognise that the rule of law is a dynamic concept for the expansion and fulfilment of ... not only ... civil and political rights of the individual in a free society, but also to establish social, economic, educational, and cultural conditions under which his legitimate aspirations and dignity may be realised."⁴ Within this intellectual framework a variety of social experiments were conceived during the last century, out of which the present movement of the 20th century has stemmed.

The ideal of liberty which the classical writers like Locke purported to support is basically unsuited to their conception of property guided by a market economy. As a matter of fact Locke started with the conception of property which was based on use-value - the exclusive use of a thing for an individual so long as he needs it for the satisfaction of his needs and no more - since it was not an unlimited control of a thing. This was the actual assumption from which Locke started. But he later abandoned this position by introducing the ideas of money and of labour as property, the capacities of one's body, in order to support and preserve the capitalistic market economy. His initial assumption was based on use-value and thus excludes the accumulation which is essential for accumulation of capital and thus to support the capitalist market economy. Thus Locke's basic natural law assumptions do not warrant unlimited individual ownership and control of the conditions

4. Nkrumah, K., "Law in Africa", J.A.L. 1962, pp. 107-108.

of labour as is clear when he states:

God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being. And tho' all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature; and no body has originally a private dominion, exclusive of the rest of mankind.

Similarly other classical writers like Hume and Bentham believed that the idea of security led to the maintenance of the unlimited control of property. Their idea of an unlimited control of an object includes all the intensivity and extensivity of ownership - the idea of benefiting from all types of uses of an object. While Hume believes that all institutions are based on utilitarian considerations to serve useful purposes, yet he is wrong in concluding that the institution of property arises out of scarcity of natural resources and unlimited human needs. Again he argues that the institution of property is the result of usurpation and not of social contract. But this reflects his idea that before such a usurpation, which brought the disparity of wealth and made a person to serve under another person who amassed excess of wealth, there was a social system in which there were no such servile classes and each individual enjoy freedom and fulfilled his needs by appropriating from nature. But if this were so, this primitive appropriation was property which served no greater purpose than to serve the needs of individuals. Getting together both these ideas, one can conclude that Hume like Locke was very truthful in finding the

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5. Locke, J., The Second Treatise of Civil Government and A Letter Concerning Toleration, edited by Gough, J.W. Oxford 1946, p. 15.

idea of fulfilling individual needs as basic to the institution of property. In fact he was busy in advancing arguments to accept as just that which was unjust, in order to support the capitalist system under the guise of maintenance of security. True to his convictions, he, as a matter of fact, believes that the essence of the institution of property lies in the personal use of property to fulfil one's needs and not in the unlimited control of things. But like his predecessors - and in this he anticipates his successors - he supported a capitalist economy guided by market forces rather than an economy aimed directly at the fulfilment of the needs of each individual. The mere belief, the solace to the poor offered by Hume and Bentham, that they should wait for the chance to come for their becoming rich is not enough for a man who would wait and see his generation dying before his eyes. Such a false hope is like the crowing of a cock who believes that his crowing before sunrise causes the sun to rise.

It is on the basis of these theories of the classical writers that Professor Honoré⁶ constructed a liberal analysis of ownership while ignoring 'the personal exclusive use of an object' as the basis and purpose of the right of ownership which in modern times is becoming the paramount interest in legal systems. His analysis reflects the social and political incidents of control over things rather than suggesting a viable criterion which holds good under all variable conditions. To regard possession as the basis of ownership in the sense of right to use except for harmful uses is correctly to identify the basis of ownership. But

6. Honoré, A.M. "Ownership", in Oxford Essays in Jurisprudence, edited by Guest, A.G., London 1961, pp. 107-128.

to add the right to derive income, etc., as equally central is to disregard the idea of possession for personal use to meet individual needs. It is to admit the unlimited right of ownership. But possession is an economic notion which gives the possessor the use of a thing to meet his needs from the thing. Thus to regard possession as the basis of ownership and to admit within its ambit the idea of non-possession is to revolt against the very basis of ownership. For example, a landlord derives a rent from the land while the tenant has the actual possession which is the economic use of the land. While the landlord's income to satisfy his needs is derived from his land and is a right to use land, it is not a direct use of the land found in the idea of possession which is the basis of ownership, implying the personal use of a thing. Since we can imagine a society in which such partial alienation is not allowed, we may conclude that such incidents are not essential to ownership. Thus to regard ownership as not based on the personal economic use of a thing is to admit that ownership is not to satisfy economic needs of individuals. This will lead to the conclusion that the concept of ownership is formulated, in part at least, by consequences other than economic, and that the law disregards economic order, which takes form and shape in possession, but recognises only the order of ownership and other real rights. A person can thus own property or be vested with the control over objects, which may affect the needs of others but which may have no relation at all to the needs of the owner. As a result of such a notion the social significance of ownership as a means to meet the economic needs of each individual has no relation to the legal analysis of the institution of ownership. The

eventual significance of this is that in the case of property as an exchange value, the propertyless man has got no significance in relation to right of property per se but is only an instrument in the production of further property for the owner. The worker is reduced to a mere factor in production, to an economic chattel because the capitalistic conception of property regards labour as a commodity which can be bought and sold. It makes, as Marx says, the private owner a commander.⁷

The concept of property as a right to an exclusive control over an object gives the notion of property-objects as essentially comprising objects of purely individual or personal use. The variability of incidents like the power of alienation, and others of the incidents identified by Honoré within different legal systems, show that it is only the right to exclusive control of a thing, which is essential to ownership since it does not vary. But with the development of the market economy the idea of use value was extended to use-value through exchange value. This was an extension of a simple use-value of a thing to a complex economic exchange of things. As a result of the introduction of exchange value into the system of property, there came into existence a number of norms, for example lease, mortgage, etc., with the result that the balance between the norm of property as exclusive control and other proprietary norms turned into an imbalance. The use value fragmented into a number of exchange values. The unity of ownership as a single right became obscured by the bundle of

7. Marx, K., Capital, London 1974, vol. i, p. 314.

associated rights. A new conception of ownership as a bundle of rights is the result of the development of the market economy. In this development the essence of ownership as bestowing control over a use-value for personal use, lost ground to incidents focused on the exchange value of an object.

Because of the shift from use value to exchange value, the idea that dominated the classical writers concerning the economic progress of society is based on ego-centric notion of providing incentive to workers in terms of money. These classical writers did not think of incentive in terms of granting some sort of recognition of the services of the workers. But it has been shown that acceptance of money value as the sole criterion of property is inadequate and there is a growing recognition of the need for its revision. Again the idea of exchange value does not submit of either objective or subjective test. There can be an exchange of corporeal things as based on monetary value, but how can refined values of life, like one's skill to play the piano, be exchanged? Again the exchange of a thing does not depend on its equivalent but on the value which different people attach to different things. For example, for a savage a beautiful painting has no exchange value. Nor, as stated by both classical writers and socialist thinkers, is labour as determining the exchange value of a thing a sufficient criterion, for there are differences in labour. One labourer working in a coal mine which is more productive produces more coal in his labour time than the other labourer who is working in a coal mine with a difficult coal seam. Or one labourer who is physically weak may

produce less in his labour time even with his best efforts than a stronger but less hard working labourer. None of these criteria can be the basis for the distribution of property. Why should either the natural abilities or the external physical conditions be the criterion for distribution of property? Why is it that the institution of property which is created to meet the needs of each individual be influenced by extraneous circumstances? The institution of property is created to meet the needs of each individual, and for both human survival and the survival of such an institution which facilitates distribution of goods for human living, the basis must be found in order to co-ordinate the means for the production of goods and the function of fulfilling the needs of each individual.

Such an idea of property as is stressed in modern socialist literature that property is a means of subsistence and therefore for personal use, represents a reversion to the real purpose of property as identified by the classical writers themselves before they switched over to their theories of a capitalist market economy; by that switch they in effect deprived man both of his personality and personalty. This is what Marx calls a systematic robbery of what is necessary for the life of the workman. The theory implicit in our modern law is that the satisfaction of individual needs makes the institution of property necessary in one form or the other. And a growing tendency is towards increasing recognition of the social interests in individual needs and their satisfaction rather than the abrogation of the rights of property. The right to subsistence is now recognised as a fundamental right.

Growing recognition of the necessity of this regulation of the function and use of the institution of property has led to more permanent changes in the relation of property and individuals in the establishment of socialised legal systems.⁸ With changes in economic and social conditions, at present the ambition is to assist and readjust the property relations that humanity may not be held less deserving of conservation than property. And the tendency of all legislation like Factory Laws, Compensation Acts, Succession Acts, etc., points in this direction. The idea of law has changed from a system of negative control (hands off) while individuals assert themselves freely, to a positive system of social institutions directed positively at social ends - there has been a change in terms of social life rather than in abstract individual wills. A great deal of old philosophy is still with us but this philosophy is increasingly encountered by growing emphasis on the responsibility of the society for the welfare of the individual.

The general point which I am trying to stress is this: that capital is not a form of personality and consequently in a distribution among men it is not morally entitled to receive anything. We should let it perform the function of production for the needs of each individual and let the society conserve it for that purpose. Capital needs labour and vice versa; but both capital and labour can be reconciled if capital is socialised in the same way as production through capital is a socialised production. Such a development in the notion of property is more in

8. For example, such offences against property as waste and unauthorised use of precious resources have been made criminal offences regardless of ownership.

harmony with the constantly changing demands that modern society makes upon it. Parallel to the growing tendency towards socialisation of property is the demand to set the institution of property on a march to meet the needs of each individual in a society. With this realisation the notion that property is an essential condition of human freedom is accepted. This idea has been gaining greater practical recognition in modern times than in the past.

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